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M TVLLI CICERONIS

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[PERDVELLIONIS REO]

ORATIO AD QVIRITES

With Notes Introduction and Appendices

BY

W E HEITLAND MA

Fellow and Lecturer of St John's College Cambridge

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TO BENJAMIN HALL KENNEDY THIS LITTLE BOOK IS DEDICATED IN TOKEN OF AN OLD PUPIL'S AFFECTION AND GRATITUDE.

ADVERTISEMENT.

IN publishing an edition of a speech of Cicero where the text bears so small a proportion to the whole work as is here the case, I feel bound to explain my reasons for producing it in such a state.

I was driven to choose between two courses, either to issue merely a text with explanatory notes, or to attempt to grapple with all the many difficulties that environ the subject. The former of these would be useless, and no middle course seemed profitable. I have therefore made the ambitious attempt to find some sound solution of all the difficulties: but I am well aware that in so doing I have undertaken an enterprise beyond my powers.

The speech is unique, and involves constitutional and legal questions of the first importance to students of Roman history, which have for the most part to be answered by painful examination of meagre and sometimes conflicting evidence. In the collection of this, and in the consultation of the lengthy and often ill-arranged treatises of modern writers on the subject, I have found the volume of matter increase upon me daily: and have at last been compelled to leave off with the knowledge that some parts of my work are in a painfully crude state. And this probably applies far more widely than I am aware.

The study of this speech and of the interesting questions connected therewith will be especially useful to students concerned with the history of the *iudicia publica*, to understand which some knowledge of the earlier *iudicia populi* is required. And addressing myself as I do to elder students I have throughout assumed that nobody will read the book who has not a fair acquaintance with the outlines of Roman history and constitutional antiquities. I have therefore made free use of technical language, which is necessary if one is to discuss intricate and obscure questions within a reasonable compass.

The merits of the speech are plain to any that will consider the position of affairs at the time of its delivery. Party hatred, fostered by desperate men, was ready to break out into violence at any moment; and the impeachment and defence of Rabirius were ominous of the coming storm. I have in my notes on the speech striven to call attention to the clever audacity of the speaker, of which there are many notable instances.

In the endeavour to make my meaning clearer I have used an elaborate system of grouping, by which I hope the questions treated in the Introduction and appendices may be kept from mutually obscuring and interfering with one another. I have made a practice of giving either by way of reference or in full quotation the authorities for the statements upon which my conclusions are based. This is a very tedious business; and many a time have I wished that I could afford to say with Madvig 'überhaupt habe ich alles weggelassen, was nur zum Prunk der Gelehrsamkeit gehört'. But of course I could not do this, and can only hope that I have not overloaded the book with irrelevant matter.

To Mr J S Reid of Gonville and Caius College I owe and hereby render my heartiest thanks. He read the whole book through in proof and sent me most valuable notes

and suggestions, of which I have made free use. To him I owe many improvements in the notes and in the readings and orthography of the text, which I have in some instances acknowledged by name. Several portions of the Introduction have been recast or amended in accordance with his suggestions. I cannot enter into further details where the debt is so great.

The text is in the main that of Baiter and Kayser's edition (Leipsic 1862), but I have not accepted all the emendations admitted by Kayser. In all cases of importance I have given my reasons in a note.

From the numerous works consulted I select a few for particular mention

Lange, Römische Alterthümer, vol I ed 3 (1876), vol II ed 2 (1867), vol III ed 2 (1876).

Zumpt, das Criminalrecht der Römischen Republik, vol I parts I and 2 (1865), vol II part I (1868) part 2 (1869).

Zumpt, der Criminalprocess der Römischen Republik (1871), [used in appendix C].

Rein, das Criminalrecht der Römer von Romulus bis auf Justinianus (1844).

Mommsen, Römisches Staatsrecht ed 2, vol I (1876) vol II (1877).

Huschke, die Multa und das Sacramentum (1874), chiefly appendix II on the trial of Rabirius.

Becker [and Marquardt], Handbuch der Römischen Alterthümer, part II (1844) part III (1851).

Madvig, die Verfassung und Verwaltung des Römischen Staates, vol I (1881) vol II (1882).

Clark, Early Roman Law (1872).

Wordsworth, Fragments and Specimens of Early Latin (1874).

The above are generally cited *by name only* in the Introduction and appendix. In the notes to the speech 'Madvig'

denotes his grammar (Eng trans ed 4), and 'Mommsen' his history (Eng trans, library ed in 4 vols). Except in names of books I have been sparing in the use of abbreviations: indeed *sctum* = *senatusconsultum* is the only one worth mentioning.

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CAMBRIDGE
Oct 5 1882.

INTRODUCTION

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F. Abstract of the speech, with Huschke's remarks.

I begin by quoting a number of passages of ancient writers from which our information on this subject is principally derived.

(*a*) Cicero pro Milone § 36 (of Clodius) *diem mihi, credo, dixerat; multam irrogarat*[1]*; actionem perduellionis intenderat*[1].

[1] These two forms of process are alternative, according to Huschke p 146. See below C (*n*). But if we rather take the form of the sentence to be a climax, then we must admit that Cicero refers to a fine-process as an *actio perduellionis.* This would of course serve to establish the conclusions arrived at in appendix K. But I do not feel so sure of this interpretation as to venture to employ the passage for this purpose.

4K

(β) Cicero de domo sua §§ 45—6 *nam cum tam moderata iudicia populi sint a maioribus constituta, primum ut ne poena capitis cum pecunia coniungatur, deinde ne improdicta die quis accusetur, ut ter ante magistratus accuset intermissa die quam multam irroget aut iudicet, quarta sit accusatio trinum nundinum prodicta die, quo die iudicium sit futurum, tum multa etiam ad placandum atque ad misericordiam reis concessa sint, deinde exorabilis populus, facilis suffragatio pro salute, denique etiam si qua res illum diem aut auspiciis aut excusatione sustulit, tota causa iudiciumque sublatum sit:—haec cum ita sint in re*[2] *ubi crimen est ubi accusator ubi testes, quid indignius quam qui neque adesse sit iussus neque citatus neque accusatus, de eius capite liberis fortunis omnibus conductos et sicarios et egentis et perditos suffragium ferre et eam legem putare?*

(γ) Cicero de legibus III § 36 *uno in genere relinqui videbatur vocis suffragium, quod ipse Cassius exceperat, perduellionis: dedit huic quoque iudicio C Caelius tabellam doluitque quoad vixit se, ut opprimeret C Popilium, nocuisse rei publicae.*

(δ) Livy I 26 §§ 5—9 *atrox visum id facinus patribus plebique, sed recens meritum facto obstabat. tamen raptus in ius ad regem. rex, ne ipse tam tristis ingratique ad vulgus iudicii ac secundum iudicium supplicii auctor esset, concilio populi advocato duumviros, inquit, qui Horatio perduellionem iudicent secundum legem facio. lex horrendi carminis erat: duumviri perduellionem iudicent; si a duumviris provocarit, provocatione certato; si vincent, caput obnubito; infelici arbori reste suspendito; verberato vel intra pomerium vel extra pomerium. hac lege duumviri creati, qui se absolvere non rebantur ea lege ne innoxium quidem posse, cum condemnassent, tum alter ex eis, Publi Horati, tibi perduellionem iudico, inquit. lictor, conliga manus. accesserat lictor iniciebatque laqueum. tum Horatius auctore Tullo, clemente legis interprete, provoco, inquit. ita de provocatione certatum ad populum est. moti homines sunt in eo iudicio maxime P Horatio patre proclamante se filiam iure caesam*

[2] Madvig (adversaria II p 217) remarks that this should have been *in ea re ubi crimen sit.* He therefore emends *in reo ubi crimen est.* To *reus* is opposed *qui neque*...etc. He also reads *putari* for *putare* below.

iudicare; ni ita esset, patrio iure in filium animadversurum fuisse[3].

(ε) Livy II 41 § 11 (case of Sp Cassius) *invenio apud quosdam, idque propius fidem est, a quaestoribus Caesone Fabio et L Valerio diem dictam perduellionis, damnatumque populi iudicio, dirutas publice aedes.*

(ζ) Livy VI 20 § 12 (of Manlius) *sunt qui per duumviros qui de perduellione anquirerent creatos auctores sint damnatum. tribuni de saxo Tarpeio deiecerunt.*

(η) Schol Bob (Orelli p 337, case of P Claudius Pulcher) *hic consul apud Drapanam adversus auspicia Poenis classe conflixit. ea pugna Romanorum naves perierunt cxx. ob id factum dies ei dicta perduellionis a Pullio et Fundanio tribunis plebis. cum comitia eius rei fierent et centuriae introducerentur, tempestas turbida coorta est: vitium intercessit. postea tribuni plebis intercesserunt ne idem homines in eodem magistratu perduellionis bis eundem accusarent. itaque actione mutata isdem accusantibus multa inrogata: populus eum damnavit aeris gravis cxx millibus.*

(θ) Livy XXVI 3 §§ 5—12 (case of Cn Fulvius) *bis est accusatus pecuniaque anquisitum: tertio testibus datis, cum, praeterquam quod omnibus probris onerabatur, iurati permulti dicerent fugae pavorisque initium a praetore ortum, ab eo desertos milites, cum haud vanum timorem ducis crederent, terga dedisse; tanta ira accensa est, ut capite anquirendum contio succlamaret. de eo quoque novum certamen ortum: nam cum bis pecunia anquisisset, tertio capitis se anquirere diceret, tribuni plebis appellati collegae negarunt se in mora esse, quo minus, quod ei*

[3] For this important case see Clark, Early Roman Law §§ 11—16. I am reminded by Mr Reid that the words *vel intra pomerium vel extra pomerium* would not be necessary until the *ius provocationis* was definitely established. Their introduction here is therefore an anachronism. And if we are meant to understand that the duumvirs had really no power to acquit (but see Clark § 13), this also smacks of the Republican period, when the duumvirs simply condemned the accused, and their sentence was merely introductory to the real trial.

more maiorum permissum esset, seu legibus seu moribus mallet, anquireret, quoad vel capitis vel pecuniae iudicasset[4] *privato. tum Sempronius perduellionis se iudicare Cn Fulvio dixit, diemque comitiis ab C Calpurnio praetore urbis petit. inde alia spes ab reo temptata est, si adesse in iudicio Q Fulvius frater posset, florens tum et fama rerum gestarum et propinqua spe Capuae potiundae. id cum per litteras miserabiliter pro fratris capite scriptas petisset Fulvius, negassentque patres e re publica esse abscedi a Capua, postquam dies comitiorum aderat, Cn Fulvius exsulatum Tarquinios abiit. id ei iustum exsilium esse scivit plebs.*

(*i*) Livy XLIII 16 §§ 10—16 (case of the two censors) *Ti Gracchi primum bona consecravit, quod in multa pignoribusque eius, qui tribunum appellasset, intercessioni non parendo, se in ordinem coegisset; C Claudio diem dixit, quod contionem ab se avocasset; et utrique censori perduellionem se iudicare pronuntiavit, diemque comitiis a C Sulpicio praetore urbano petiit. non recusantibus censoribus quominus primo quoque tempore iudicium de se populus faceret, in ante diem octavum et septimum Kal Octobres comitiis perduellionis dicta dies. censores extemplo in atrium Libertatis escenderunt, et ibi signatis tabellis publicis clausoque tabulario et dimissis servis publicis negarunt se prius quicquam publici negotii gesturos, quam iudicium populi de se factum esset. prior Claudius causam dixit; et cum ex duodecim centuriis equitum octo censorem condemnassent multaeque aliae primae classis, extemplo principes civitatis in conspectu populi anulis aureis positis vestem mutarunt, ut supplices plebem circumirent. maxime tamen sententiam vertisse dicitur Ti Grocchus, quod cum clamor undique plebis esset periculum Graccho non esse, conceptis verbis iuravit, si collega damnatus esset, non exspectato de se iudicio comitem exsilii eius futurum. adeo tamen ad extremum spei venit reus, ut octo centuriae ad damnationem defuerint. absoluto Claudio tribunus plebis negavit se Gracchum morari.*

[4] In this passage *capitis* answers to *legibus*, *pecuniae* to *moribus*. Thus there are here (as Huschke pp 145—6 remarks) two things based on custom, (a) the tribune's right of choice, (b) the fine-procedure itself.

(κ) Livy XXV 4 §§ 7—11 (case of the fraudulent contractor M Postumius Pyrgensis, who had been accused for *peculatus*, with fine-penalty in view, before the tribes but had caused his friends to use violence so as to prevent a vote being taken) *haec cum ab optimo quoque pro atrocitate rei iacta essent, vimque eam contra rem publicam et pernicioso exemplo factam senatus decresset, confestim Carvilii tribuni plebis omissa multae certatione rei capitalis diem Postumio dixerunt, ac ni vades daret, prendi a viatore atque in carcerem duci iusserunt. Postumius vadibus datis non adfuit. tribuni plebem rogaverunt, plebesque ita scivit, si M Postumius ante kal Maias non prodisset, citatusque eo die non respondisset neque excusatus esset, videri eum in exsilio esse; bonaque eius venire, ipsi aqua et igni placere interdici. singulis deinde eorum, qui turbae ac tumultus concitatores fuerant, rei capitalis diem dicere ac vades poscere coeperunt. primo non dantis, deinde etiam eos qui dare possent in carcerem coiciebant; cuius rei periculum vitantes plerique in exsilium abierunt.*

(λ) Cicero de legibus III § 6 *cum magistratus iudicassit irrogassitve, per populum multae poenae*[5] *certatio esto.* And § 10 *omnes magistratus auspicium iudiciumque habento.* And § 27 *deinceps igitur omnibus magistratibus auspicia et iudicia dantur: iudicia, ut esset populi potestas ad quam provocaretur; auspicia, ut multos inutiles comitiatus probabiles inpedirent morae: saepe enim populi impetum iniustum auspiciis di inmortales represserunt.*

(μ) Cicero II in Verrem I §§ 12—14 *ex hoc quoque evaserit: proficiscar eo, quo me iam pridem vocat populus Romanus: de iure enim libertatis et civitatis suum putat esse iudicium et recte putat. confringat iste sane vi sua consilia senatoria, quaestiones omnium perrumpat, evolet ex vestra severitate: mihi credite, artioribus apud populum Romanum laqueis tenebitur.* * * * * * * * * * * *credent omnes quinque et triginta tribus*[6] * * * * * * * *hanc ego*

[5] Mommsen I p 156 prefers to read *poenae multae.*

[6] This refers to the centuries, which, since they had been brought into direct correspondence with the tribes, are constantly spoken of in this sort of way.

causam cum agam beneficio populi Romani de loco superiore, non vereor ne aut istum vis ulla ex populi Romani suffragiis eripere aut a me ullum munus aedilitatis amplius aut gratius populo Romano esse possit.

(*v*) Dionysius VIII 80 (some wanted to put Sp Cassius' children to death, but the senate interposed: hence the still preserved custom) *ἀφεῖσθαι τιμωρίας ἁπάσης τοὺς παῖδας ὧν ἂν οἱ πατέρες ἀδικήσωσιν, ἐάν τε τυράννων ὄντες υἱοὶ τύχωσιν, ἐάν τε πατροκτόνων, ἐάν τε προδοτῶν, ὃ μέγιστόν ἐστι παρ' ἐκείνοις ἀδίκημα*[7].

A

(*a*) The word *perduellis* originally meant 'enemy'. This is proved, not only by its derivation from *duellum* and the prefix *per* which stamped it with an unfavourable[1] sense found also in *perfidus periurus perdere perire perperam* etc, but also by the testimony of antiquity[2] and the many surviving traces[3] of ancient usage. But as the word *hostis* lost its original wide meaning 'stranger' and came to mean no more than 'enemy'; so by a like narrowing *perduellis* came to mean only 'internal enemy', a traitor or enemy to his own country. The offence committed by such a person is *perduellio*, a term closely corresponding to our 'high treason'.

[7] I must remark that, even if with Huschke p 181 we see in these three crimes respectively *perduellio parricidium* and *proditio*—and I grant it probable—, still there is nothing to shew that, regarded as offences against the state, they could not all be brought under the general notion of *perduellio*. I cannot see the marked distinction between this and *proditio*, asserted by Lange I 384. That we do not hear of cases of *proditio* coming before the centuries is (as he admits II 526) owing to such offences being dealt with in the field under the plenary *imperium* of the general. Add that Cic de orat II § 164 and Tac ann I 72 bring *proditio* under the head of *maiestas*. See below C (*o*).

[1] See Curtius, Grundzüge § 346, who compares Sk *para*, Gk *παρά*, Goth *fair*, OHG *fer*, NHG *ver* [as in *verbrechen*, *verrath*, *verruf* &c]. He calls it the 'Gebrauch in malam partem'.

[2] Collected by Rein Crim p 465, Clark § 16, Müller's Festus p 102 note.

[3] See for instance Cic de off III § 107, Plaut Pseud 583, Liv XXV 12 § 10, Tac ann XIV 29.

(*b*) It is impossible to give any more precise definition of *perduellio* by specifying any class or classes of actions to which alone that term could strictly speaking be applied. I cannot find that the ancients themselves had any such definition; nor is such to be looked for[4] in the infancy of jurisprudence. At the same time it is to be observed that the word needed no further definition. We hear of a law of *perduellio* existing in the regal period; but it seems to have dealt only with the procedure to be followed and the punishment to be inflicted on the guilty. The truth is that in a trial for *perduellio* the question raised was not so much a question of fact as of intent or effect. If the people hold that a citizen has by some course of action harmed or imperilled the state, they find him guilty of *perduellio:* if not, they acquit him. Thus, by being the ultimate judge of the quality[5] of the action, the sovereign people is the guardian of its own safety and honour.

It is only by holding fast this conception of *perduellio* that we can understand how it was that such a variety of offences were able to be brought under it. We hear of many forms of treason directly political, both within the city, as attempts to kill injure or impede in execution of duty the officers of the state, misuse of magisterial powers, aiming at monarchy[6], and indeed conspiracies in general; also without the city, as treasonable assistance of or correspondence with an enemy: and of others not directly political but either military, as cases of cowardice neglect or other misconduct in the field; or religious, as neglect of auspices etc; or such injuries as are inflicted upon the state by violence used by a fraudulent contractor to defeat the ends of justice: a strange though not exhaustive list of offences, which had only this one point[7] in common, that they were held to outrage the majesty and endanger the security of Rome.

[4] See Maine's Ancient Law c 9 (p 316), c 10 (p 372). The change in legal conceptions is from general to special. It seems that there was no definition of Treason in the old English law.

[5] See Maine's Ancient Law c 10, Sheldon Amos' Science of Law c 10 (p 237).

[6] *adfectatio regni.* See passage (*v*) quoted above.

[7] With this view Madvig II p 274 essentially agrees.

B

We have now to consider the courts before which cases of *perduellio* were brought, and the procedure employed. The earliest case recorded—that of Horatius—is said to have been tried by *duumviri*. We hear of such in one account of the condemnation of Manlius, and we know that Rabirius was brought before such a commission. The following points in connexion with them deserve mention.

(*a*) They were probably an extraordinary[1] commission, not a standing court of justice. Indeed it is inconceivable that they could have been the latter in the time of the kings.

(*b*) We do not know that the king was obliged to appoint them. I am inclined to think with Lange[2] that he was not; but that, if he for any reason shrank from exercising in any case the plenary jurisdiction which he had in virtue of his *imperium*, he could and did appoint such commissioners, from whose sentence there was an appeal to the people in their curies, while from that of the king himself there was none.

(*c*) What was the form which the appointment denoted by the word '*facio*' took, is not certain. It may have been that of direct nomination by the king. But it is perhaps more probable[3] that the king announced his intention of laying the case before commissioners, who were then by his permission chosen by the curies. This would agree with the story that Manlius was condemned through (*per* = through the intervention or agency of) duumvirs duly elected (*creati*) to conduct the enquiry; and also with Cicero's objection (§ 12) to the nomination of the two who tried Rabirius as legally null.

(*d*) It is not certain[4] why they were two in number.

[1] Mommsen Röm Staatsrecht II p 598, Clark § 12.

[2] Lange I 383—5, 405, Mommsen II p 599.

[3] I cannot make out exactly Lange's opinion. Madvig II p 303 seems to agree, and Zumpt I 1 p 92 and Clark § 12 certainly do. In any case, as Mommsen II p 599 points out, the Republican magistrates lost the power of nomination unless specially empowered by a vote of the *comitia*.

[4] Lange I 383, Mommsen II p 601. Huschke p 200 notes a dualism (one of

Lange regards them as representatives of the Ramnes and Tities, which would agree well with his theory of the Alban origin of the Luceres. On this point I will not offer an opinion: but I readily admit that they do not afford an instance of anticipation of the collegiate system of the Republic in the Regal period.

(*e*) It seems that jurisdiction was exercised, or at least sentence pronounced, by one[5] only: and that they cast lots to determine on whom the duty should fall.

(*f*) That the duumviral procedure lived on into the Republican age seems probable, though the traces of it are slight and scattered. Huschke points out that we very often hear of two tribunes accusing, and suggests that perhaps they acted as duumvirs. Lange[6] thinks that the quaestors in the case of Sp Cassius may have done so.

(*g*) In any case we know that the trial by duumvirs became obsolete[7] long before the time of Cicero. It is clear that this antiquated form of trial was revived simply as a convenient means of securing a triumph for the so-called 'popular' party by impugning through the condemnation of Rabirius the validity of the *sctum ultimum*. It is worth noting that we have distinct mention of *duumviri perduellionis* only in the three cases of Horatius Manlius and Rabirius.

two acting the other consenting) in early times. He thinks that there were regularly two accusers in *iudicia populi* (perhaps under the official title of *duumviri*) and thus explains *duorum virorum iudicium* in Cic orator § 156, no other court of two being known to us. See also Lange II 534. The case of *duoviri aedi dedicandae* offers an interesting parallel. Two were chosen, one carried out the dedication.

[5] Lange I 383, III 241, Mommsen II p 601. Hence Livy I 26 § 7 *tum alter ex eis*, Suet Julius 12 *sorte iudex in reum ductus*. Huschke remarks that the mention of one quaestor by Cic de republ II § 60 in the case of Sp Cassius, while Liv II 41 and Dionys VIII 77 speak of two, is probably to be explained in the same way. I cannot agree with Zumpt I 2 p 393 and Madvig II p 304 that the two who tried Rabirius were chosen by lot out of a large number. The lot was not likely to fall on the two Caesars.

[6] Lange I 384, Mommsen II p 601.

[7] See Lange I 385, II 525, III 241, Madvig II p 304.

C

But by far the greater number of the trials for *perduellio* with which we are acquainted occurred in the Republican period, and the procedure was of a very different kind from the above. At the risk of seeming tedious I venture to append a sketch of this procedure, without some account of which it is impossible to understand the case of Rabirius and indeed many others also. The matter of this chapter (C) is mainly taken from or written with reference to Zumpt's Criminalrecht, where the subject is dealt with more at length than in any of the other works I have been able to consult.

(*a*) It is well known that Roman jurisprudence from very early times distinguished the two stages of a civil action (1) the definition of the legal question involved, known as the proceeding *in iure*, being conducted before the magistrate, and (2) the decision of this question, known as the proceeding *in iudicio*, being conducted before the competent court, whether held by the magistrate himself or by some *iudex* to whom he referred the matter. But it seems that this principle of division was recognized in criminal[1] actions also, and that they also began with *in ius vocatio:* thus Horatius was we are told *raptus in ius ad regem.* We shall presently see that the procedure of the criminal trials before the people (*iudicia populi*) falls into these divisions.

(*b*) The accusers[2] must be magistrates: as a matter of fact they were almost always the *quaestores* in the period before the Twelve Tables; after that date generally *tribuni plebis*, now and then their subordinates the *aediles.* At the

[1] Zumpt I 2 pp 168—70.

[2] See Zumpt I 2 pp 242—3, Mommsen II p 290, Lange I 385—9. The aediles seem to have been originally to the tribunes much what the quaestors were to the consuls, see also Mommsen II pp 466—7. Perhaps the aediles could only accuse in fine-processes, Huschke p 198, Lange II 514, and the cases taken up by them seem to have been chiefly those that came under some definite statute. For the quaestors see note on Introd D (2). Mommsen II pp 302, 600, thinks they were only competent to deal with murder and other common non-political offences.

iudicium or trial proper a magistrate *cum imperio* had to preside: hence such were excluded from appearing as accusers. It should be observed that the popular jurisdiction as we find it under the Republic was no doubt developed[3] out of the *provocatio* or right of appeal against the exercise of the magistrate's *imperium* or *coercitio*. Indeed the *iudicia populi* in cases of no political bearing[4]—what Zumpt calls the 'ordinary' procedure—always rested directly on this right of the citizen to appeal. The appeal lay to the people in their centuries. We shall see that in trials of political import (such as *perduellio*) the connexion with the right of appeal was less[5] direct. With the later action of the *comitia tributa* and their competence to pass sentence in certain cases we have for the present nothing to do. But it is well to take notice of their action[6] in the period before the Twelve Tables, because it was out of the struggles connected therewith that the later power of the tribunes as accusers was developed. It was constantly maintained by the patricians that the *plebs* and its magistrates[7] had no jurisdiction over patricians. But they were not able to make their contention good except so far as to require that before a tribune brought a patrician to the bar of the assembled *plebs* he must have obtained permission from the senate in the form of a *sctum*[8] to that effect. Gradually it

[3] See Zumpt I 2 pp 175, 205, Mommsen II pp 289—90.

[4] Huschke pp 147—156 points out that (so far as we know) the ordinary procedure always applied to both orders alike. He ingeniously traces the extraordinary procedure up to the compacts between the patricians and plebeians. These were at first practically two states, and the mutual jurisdiction really rests on *deditio* of the offender according to a sort of international law. See the demand in Livy III 53 § 5. For the compacts called *leges sacratae*, which protected the tribunes, see III 55 with Weissenborn's notes.

[5] See below (*e*).

[6] Zumpt I 2 pp 245, 249—50, 268—9.

[7] The tribunes were practically *magistratus populi Romani* since 448 B C. Lange I 827—8.

[8] Zumpt I 1 pp 261, 266—79, and 2 p 275. Though I have thought it best to give this view in the text, I feel bound to add that the evidence adduced in its favour consists of dubious and sometimes forced interpretations of passages which supply no direct proof. That such a *sctum* should have been necessary is not *a priori* very probable; though it may have been customary, as in the case of legislation in the later times of the Republic. Doubtless there were now and then offenders whom even the senate desired to punish.

became impossible to refuse this, and so the patricians lost their chief motive for resisting the extension of the tribunician powers in this direction. Hence it is that, when once the legislative power of the tribes becomes coordinate with that of the centuries, we find the tribunes acting as accusers in capital trials before the latter body[9] without any opposition from the patricians. No doubt these last reflected that it was better to be brought before the centuries than the tribes, it being so much more difficult to secure a condemnation.

(*c*) We now pass on to consider the division of a criminal trial before the people (*iudicium populi*) into the proceeding *in iure* and that *in iudicio*. The view of Zumpt[10] is that the *in iure* division is found under three forms for different purposes or at different dates. There are (1) the *sctum* of the early Republic, doubtless not granted without careful inquiry, (2) the preliminary proceeding before the magistrate in cases of 'ordinary' or non-political trials, (3) the proceeding before the magistrate and the hearings before the people down to the end of the third hearing, the procedure employed in the 'extraordinary' trials, those of political import. It is with the details of these 'extraordinary' trials that we are concerned here. Now the view of Zumpt is open to this objection. The three hearings referred to were conducted before the whole body of citizens assembled in *contio*, and these citizens are also the ultimate judges in the case: besides witnesses are produced on all three occasions. This is very unlike what we know of other proceedings *in iure*, and it is perhaps safer in the grievous dearth of evidence to hold that the first appearance of the accused before the accusing magistrate is the true *in iure* proceeding in such cases. Then the first three hearings will count as parts of the proceeding *in*

[9] Mommsen II p 290, Lange II 514, Zumpt I 2 pp 242—6. In any case some distinction of periods should be made. The full legislative coordination of centuries and tribes may be best dated from 287 BC (*lex Hortensia*, Lange II 439), and by that time the tribunes had already become a regular instrument of senatorial government and the distinction between patricians and plebeians had ceased to have much practical importance.

[10] Zumpt I 2 pp 169—70, 239, 245, 249—50, 268—9.

iudicio together with the fourth or final hearing. I proceed to consider the proceedings in one of these public criminal trials, without attempting to decide whether Zumpt's distinction between 'ordinary' and 'extraordinary' trials be valid or not: for I am convinced that it is not of much practical importance for our present purpose.

(*d*) First, the supposed offender was ordered to appear (*adesse iussus*) before the tribune, who declared his intention of bringing him to trial and fixed a day for the first hearing of the case to take place (*diei dictio*). This act[11] made the man technically *reus*. If the tribune chose, he might name the current day and proceed at once with the first hearing. This was as follows. The tribune called the people together to an informal meeting (*contio*) in some public place, generally the forum. He presided himself: and the *reus* or *privatus* was now publicly summoned by the voice of the herald to appear before the people (*citatus*) and called upon to make his defence (*causam dicere iussus*). Speeches were made on both sides and witnesses produced (*testes dare* or *proferre*). Perhaps[12] the penalty was named by the accuser. When the tribune saw fit, he declared the hearing adjourned[13] to another day (*diem prodixit*) which he named. He then bound over the accused to appear at the time named, usually by finding sureties (*vades dare*)[14] for his appearance: but if the case was a very serious one he imprisoned him during the interval rather than leave him at large on any terms. When the day for the second hearing arrived, proceedings began again with the *citatio* and continued till the tribune as before announced the *prodictio diei*. In like manner the third hearing was conducted, but the position of affairs at its close was essentially different. It was no longer[15] in the power of the tribune to

[11] Zumpt I 2 p 301. See Cic de domo § 83 *cui dies dicta numquam est, qui reus non fui, qui numquam sum a tribuno plebis citatus.*

[12] See Livy XXVI 3.

[13] When Clodius accused Milo in B C 56 the first hearing was on Feb 2, the second on Feb 6, the third on Feb 17. The fourth was on May 7. See Cic ad Q fratrem II 3 §§ 1, 2, 5 § 4, Zumpt I 2 p 249.

[14] Livy III 13, Zumpt I 2 p 278, Lange II 508—9. See note 29 below.

[15] Zumpt I 2 pp 240—1, 271, 325—6.

adjourn the further hearing of the case to a day fixed by himself. The day was already fixed by the consul or (according to later practice) the *praetor*[16] *urbanus*, from whom the accuser had in the first instance to ask for the appointment of a day for holding a meeting of the *comitia centuriata*, to give the final decision. And a certain interval[17] had to be left between this day of formal assembly and the end of the informal procedure in *contiones*. Another difference was that from this time forth the people had before them the definite issue[18] upon which they would be required to pass judgment. At the end of the third hearing the accuser was in a position to judge of the feeling of the people, and so to draw up his indictment as to have the best chance of procuring the condemnation of the accused. This he did, and posted it up in the forum for all to see during a space of three market days (*trinum nundinum*), the statutable interval which had to elapse before the formal *comitia* could be held for the final decision.

(*e*) It is well to pause here and consider[19] what was the effect of the proceedings up to this point. The three hearings, each taking up one day and being separated by intervals of uncertain length (*intermissa die*)[20], are loosely spoken of as *prima secunda tertia accusatio*. But in truth they are merely parts of the one enquiry (*anquisitio*) which terminated in the fourth or final hearing and a vote of the

[16] Livy XXVI 3 § 9, XLIII 16 § 11, Antias apud Gell VI (VII) 9 § 9 *tribunus plebi perduellionem ei diem dixit et comitiis diem a M Marcio praetore peposcit*, Zumpt I 2 pp 240—2, 326, Mommsen I p 192. It seems that the praetor could not refuse.

[17] The *trinundinum*. But originally and properly the interval was in case of the *comitia centuriata* the *iusti xxx dies* derived from the practice used in declaration of war. The *trinundinum* may have been introduced after the reform of the centuries. See Zumpt I 2 pp 249—50, Lange II 509, 668. The markets fell on every ninth day. Thus it will be seen that by the Roman method of reckoning a period of 17 days at least must elapse before the voting took place. After the *lex Hortensia* (note 35 below) it was customary to hold the *comitia* on the *dies comitialis* next after the third *nundinae*.

[18] Zumpt I 2 pp 258—62, Lange II 509.

[19] See generally Zumpt I 2 pp 269—70. Lange II 509.

[20] *dies* = 'a certain time' not defined. It seems to have been never less than a day. See Zumpt I 2 p 249, Lange II 509.

comitia centuriata. They are merely *contiones* in which no vote is taken and consequently no decision arrived at. But the interest of the people has been excited and has shewn itself so that both accuser and accused can tell what are the vital points in their case, on what passions they will be able most effectually to work. Besides there is now a formal indictment drawn up and made known to every one. But there is strictly speaking no *iudicium* as yet: true, the tribune has, by determining to press the charge, given a sort of *iudicium* of his own ; but this, until confirmed by a vote of the centuries, is of no force or validity. There is therefore nothing[21] against which the accused should appeal: no *iudicium*, no *provocatio.* Hence we do not hear of appeals in these cases: before the fourth hearing there is nothing to appeal against, and from the fourth hearing itself there is no appeal. It is final, and to it alone are the expressions *accusatio* and *certatio* properly applied.

(*f*) When the day of the fourth hearing[22] was now come, the consul or praetor gave orders early in the morning for the people to be duly summoned to a meeting (*conventionem* = *contionem*), and the accused received a further summons both through the herald (*praeco*) and through the horn-blower (*cornicen*), who blew a blast before his door. His presence was now necessary, as we shall see below. The people poured out of the city to a spot named, generally a part of the *campus Martius.* The presiding magistrate took his seat, the accuser appeared, the accused was called and answered to his name. Both sides were now well prepared and backed up by their friends. The charge was read out, and thereupon followed the speeches for the prosecution and defence and the witnesses in support of either. When all this had been got through, the presiding magistrate gave orders for the cen-

[21] Zumpt I 2 p 270. He means or ought to mean that the appeal against the formal *iudicium* of the accuser was always made or assumed, and in the first three hearings there was no *iudicium* at all. Had there been such, there could have been no appeal from it. See below (*n*).

[22] For the matter of this section see Zumpt I 2 pp 262 foll, Varro ling Lat VI §§ 90—2 (included in Wordsworth p 367), Lange II 509.

turies to be formed, [in the period after the reform of the *comitia centuriata* lots were cast to determine which of them should vote first (*praerogativa*)] and the voting began. Votes were originally given openly by word of mouth, but the ballot[23] was introduced in the second century B C. If a majority of centuries pronounced the accused guilty of the charge preferred against him, the president declared the result and handed over the prisoner[24] to the accuser for execution of the sentence. If a majority acquitted him, he was *ipso facto* a free man in possession of all his former rights. As the vote was in effect a simple Aye or No, there could be no other sentence passed on him than that proposed by the accuser.

(*g*) If all went smoothly as I have described, the procedure though clumsy to the last degree had at all events done its work. But there could be no security for this, and indeed the wonder is that it ever worked at all—at least so as to procure a condemnation. The truth is, it could not work unless there was a strong popular feeling against the accused and unless the whole college of tribunes were unanimous or at least indifferent. Thus the less security for justice the greater likelihood of conviction. Before we go on to consider in detail the various hindrances to a successful completion of the proceedings it will be well to call attention to two important points; first, that all had to be got through[25] in the one day before sundown, second, that old custom resting on religious scruples[26] forbade the accusation of the same person a second time on the same capital charge by the same magistrate.

[23] See note on *suffragiis* § 5 of the speech.

[24] See Livy VI 20 § 12, Zumpt I 2 p 336 (compare 170). This is the after-procedure *in iure*, for which in the trials under *quaestiones perpetuae* see Zumpt's Criminalprocess pp 372—411.

[25] Becker Röm Alt II 3 p 113, Lange II 566, Zumpt I 2 p 266. But it would take less time to vote on one simple judicial issue than at the election of several officers out of a number of candidates. Lange II 492. It should be remembered that originally all suits whatever had to be gone through in a day.

[26] See Introd E (*f*) § 1 note, and passage (*η*) at head of Introduction, Zumpt I 2 p 265.

(*h*) The hindrances[27] just referred to were in general as follows:

(1) The *intercessio* of a tribune. This might of course be employed to stop proceedings at any stage. But it was not customary to employ it at the preliminary hearings. This means of protection for the accused was probably not very often employed, and was anyhow too capricious in its action to be of any certain use in furtherance of justice.

(2) An obstructive policy on the part of the accused and his supporters. This would for the most part take the form of an effort to 'talk out the motion' (*dicendo diem eximere* or *consumere* etc). It is to be remembered that there was a long day's work to be got through in any case. The assembly of the centuries for voting was preceded by the fourth *contio*, and was even by itself a most clumsy apparatus at all times.

(3) Unfavourable auspices, *obnuntiatio*, and the occurrence of any phenomena regarded as ominous. It is unnecessary to dwell at any length on this familiar subject.

(4) The removal of the red flag, whether as a *bona fide* warning of an enemy's approach or as a dodge in the interest of the accused. See appendix I.

(5) The absence of the accused on some good ground (e g *excusatio morbi*). It seems that it rested with the accusing tribune[28] to decide whether an excuse was valid or not, his decision not being final unless approved by the consent or silence of his colleagues.

So many chances had even the guiltiest criminal of escaping punishment without acquittal.

(*i*) Another case remains to be dealt with, that of a man who went into voluntary exile[29] at some time during the

[27] For the matter of this section generally see Zumpt I 2 pp 264—6, 271, 274—5, Lange II 557—60, 566.

[28] Zumpt I 2 p 271.

[29] Zumpt I 2 pp 279—80 thinks that, when Polyb VI 14 says that a man might escape even at the last moment by going into exile, he is not consider-

fourth hearing. There could be no doubt as to his motive for so doing, and accordingly such an act was held tantamount to a confession of guilt. But it was not now possible for the *comitia centuriata* to pass sentence of death upon him in his absence. He was not however allowed to escape scot-free by absconding. The tribune adopted another course. He called together the *comitia tributa*, where he moved for a decree in absence[30] against the criminal. This was outlawry[31], generally accompanied by confiscation of goods. It seems that this proceeding was possible because the sentence thus passed, though in effect *capitis*, was regarded not as a *iudicium* in the strict sense but only as a public recognition[32] of a state of fact. A correct view of this proceeding is most important, particularly to readers of Livy, for many of the cases in which sentence was passed on men who were clearly *perduelles* are only to be understood by bearing it in mind; and the accounts of such trials are not seldom inaccurate owing to the misconceptions of the writer, and from their meagreness generally obscure.

(*k*) It should be remarked that, according to Roman custom, the withdrawal[33] of the accuser at any stage of the trial from the further prosecution of the charge necessarily brought the trial to an end: And it does not appear that he was obliged to proceed (as described in the last paragraph) against one who absconded.

(*l*) It may be well to mention here the opinion of Zumpt[34]

ing the case of men detained in prison as the worst offenders would be. If he did not appear at one or more of the preliminary hearings, there was time to have him fetched. But from Livy III 13 it would seem that such imprisonment had practically gone out of use since the trial of Kaeso Quinctius in B C 461. See however XXV 4. In the very exceptional case of Pleminius the excited state of public feeling accounts for the imprisonment.

[30] See Wharton's Law Lexicon under 'absence'.

[31] Livy XXV 4, XXVI 3, Zumpt I 2 pp 280—2 and 352—3 for case of Saturninus against Metellus.

[32] Zumpt I 2 p 281.

[33] Zumpt I 2 pp 277—8.

[34] Zumpt I 2 pp 272—3. He dates this right from the rise of the tribunician capital procedure after the XII tables. But it seems to have rested on usage (Liv XXVI 3) and so Huschke p 146 objects to this date. The decision of the people could only be given on the issue subjected to it: hence the tribunes could make the penalty more or less severe,

as to the accuser's power of choosing in what court he would press for the final decision, and consequently what penalty he would propose to inflict. His view is this. Two periods in the history of the procedure may be traced. In the earlier we find the connexion between the three preliminary hearings and the fourth or final one still distant and loose: in the later they are brought into close connexion. In the earlier period the tribune could after the three hearings decide for himself whether he would aim at procuring a capital sentence from the centuries or content himself with moving for the infliction of a fine (*multae irrogatio*) in the assembly of the tribes. If he chose the former, he must apply to the consul or *praetor urbanus* to name some *dies comitialis*[35] for the purpose; if the latter, he could (unless his own colleagues interfered) make all the necessary arrangements himself. In the later period he was obliged[36] to choose from the outset the course he meant to pursue. The date of this change is uncertain; its effect, and perhaps the object of its promoters, was to make capital trials more difficult and so more rare.

(*m*) I have referred above to the practice of the tribunes in the period before the Twelve Tables, of bringing offenders before the assembly of tribes, and pointed out that in the case of patrician offenders it was perhaps necessary to procure the consent of the senate. But it seems that this attempt to secure for the tribes a capital jurisdiction[37] coordinate with that of the centuries was foiled by the legislation of the decemvirs. There remained the power of inflicting fines, and this milder form of penalty sufficed[38] for many—perhaps

see Lange II 668—9 and case of Menenius in Liv II 52 § 5, perhaps even remit it after condemnation, Liv III 58 § 10.

[35] Originally meetings of the *plebs* and *comitia tributa* were held on *nundinae*, but since the *lex Hortensia* of 287 B C the tribes like the centuries conformed to the patrician calendar and avoided *nundinae*. Zumpt I 2 pp 203, 250, Lange II 439—41.

[36] Huschke p 146 seems to think that this limitation never did exist, arguing from the alternatives mentioned in Cic pro Mil § 36. See also ibid p 525.

[37] Whether a sentence passed by the tribes ever came to entail an effect upon *caput*, is another matter. See appendix K.

[38] Lange II 539 well remarks that one great defect in the development of the Roman criminal law arose from the fact that the division of the jurisdiction

most—public offenders, and was recommended by the greater ease with which a conviction could be obtained. The procedure was the same as that described above, so far as the three hearings and following interval were concerned: but the fourth hearing took the simple form of a motion in the *comitia tributa* for the infliction of a fine on the accused. It was a *rogatio* of the ordinary legislative kind: the accuser was said *irrogare multam.*

(*n*) In connexion with these two forms of trial it will be well to speak[89] of the word *iudicare*, which in some passages seems to bear a remarkable sense. The passages are quoted at the head of the Introduction, so that they need only be referred to here. First come Cicero's words in de domo § 45 *ut ter ante.....quam multam irroget aut iudicet.* The two expressions are clearly coordinate, and the former means 'moving for the infliction of a fine' (before the tribes): surely then *iudicet* refers to the process before the centuries: but what is the *iudicium* implied? In de legibus III § 6 we have *multae* corresponding to *irrogassit* and *poenae* to *iudicassit.* [If the expressions in pro Milone § 36 be really alternatives, this passage would be very important here, but see note on passage (α) at head]. In Livy I 26 § 7 we find *tibi perduellionem iudico,* in XLIII 16 § 11 *utrique censori perduellionem se iudicare.* But in Livy XXVI 3 §§ 8, 9 we have *vel capitis vel pecuniae iudicasset* and *perduellionis se iudicare Cn Fulvio.* Here we have *iudicare* used in speaking of the fine and the capital penalty alike. Nor is this unnatural, if we regard all the jurisdiction of the *comitia* as based on the right of appeal, and the appeal as necessarily preceded by a *iudicium* of some kind, from which the appeal is made. This view is borne out by Cicero de legibus III § 10 where the power of *iudicium* is

of centuries and tribes rested on a difference not in the offences proper to each but in the penalties. Hence the accuser (in political cases at least) looked first to making sure of the penalty and then brought the charge under some head of the criminal law.

[89] In dealing with this question I have received most help from Mr Reid. After long consideration I have found myself unable to follow the ingenious speculations of Zumpt I 2 pp 184—7, 248, 260, 330—4. See Lange II 538.

assigned to all magistrates, while in § 27 this power is explained to be the basis of *provocatio.* Indeed this right of appeal must necessarily have rested on something that was technically and historically a *iudicium,* however insignificant and formal it might be. And the more firmly *provocatio* was established, the more formal the *iudicium* became. Not only would the *iudicium* of an accuser be necessarily a condemnation, but without condemnation there would be no appeal. Hence Cicero (pro Rab § 12) complains that the sentence of the duumvirs was practically no *iudicium* at all. [And it seems that the later Romans were led, by their regarding it as a mere formality themselves, to fancy that in the regal period acquittal by the duumvirs was even barred by statute, see note on passage (δ) at head]. Hence it will be seen that even in a fine-process there is technically a *iudicium* to begin with, though practically of no effect in itself, but only rendered effectual by a final[40] confirmatory vote of the tribes given on the question raised by the appeal. That we do not find the expression *poenam capitalem irrogare* in use is to be explained by the phrases employed in the first stage of capital and fine processes respectively—*perduellionem tibi iudico, multam tibi dico,*—where it is seen at once that *iudicare* was most strictly used in referring to the capital process before the centuries. That it could well be used in referring to the fine process before the tribes I have shewn above: the newer word *irrogare* seems to have been regularly confined to the second stage of the process before the tribes.

(*o*) I feel bound also to add that Zumpt strongly holds[41] the opinion that since the Twelve Tables *perduellio* bore the general sense of an offence[42] worthy of death. This view, which was also that of Sigonius, he supports by a number of arguments of which the following are the most important. We see that in the cases of P Claudius Pulcher and Cn Fulvius the *perduellio* is of a very general nature; indeed in

[40] See appendix K.

[41] Zumpt I 2 pp 330—5.

[42] Thus in the earlier case of Kaeso Quinctius Dionysius X 5 says *εἰσάγουσιν αὐτὸν ὑπὸ δίκην ἀδικήματος δημοσίου, θανάτου τιμησάμενοι τὴν δίκην.* But in 48 he uses *ἀδίκημα δημόσιον* of the offence in a fine-process.

the latter case Livy makes it = capital offence. These cases it is true are of a military[43] nature: but that of the two censors is not, nor can it be explained as *perduellio* on any other assumption than that given above. Again the use of *iudicare* as opposed to *multam irrogare* seems to group the capital trials together and to correspond to the expression in which the word *perduellio* occurs. I wish I felt more satisfied as to the completeness of the proof of this; as it is, I can only say that with one limitation—applying it only to the cases of a political nature[44] dealt with by the 'extraordinary' process of the tribunes, which I believe Zumpt to mean—I think it probable. For the present I prefer to say with Lange[45] that it is but natural we should hear only of politically important cases, and that cases of *perduellio* are especially of this nature, being generally accusations of magistrates. What with the fine-processes before the tribes and occasional special commissions, the capital processes before the centuries probably became exclusively political and very rare. Indeed in all the fifth century of the city (353—253 B C) we do not find a single case of the kind,—no doubt because the tribunes were on good terms with the nobility.

(*p*) In order to give some sort of historical completeness to this sketch of a large and difficult subject, it will be necessary to say a few words[46] on the rise of the *crimen maiestatis* and the early legislation relating thereto. It had become more and more an established custom to apply the fine-process before the tribes to cases that might have been treated as *perduellio*. Sooner or later some one was sure to find out a simpler way of dealing with all or some of these cases. As the social and political fabric of the Republic gave way, the need became more pressing. At last the tribune L Appuleius

[43] See note on passage (*v*) quoted above.

[44] This will agree with the separation of *perduellio* from other *iudicia populi* in Cic de legibus III § 36. Madvig II p 303 seems to take the same view. See also the words of Dion (p 29) *οὐ γὰρ ἁπλῶς* etc, where however *ἁπλῶς* probably refers to the procedure before a *quaestio perpetua*.

[45] Lange II 511—8, 522—4, Huschke pp 168, 177.

[46] See generally Zumpt II 1 pp 227—36, Lange II 619, 551, III 80—2, 108, 165, Madvig II pp 274—7.

Saturninus, having through the violent assault of the quaestor Q Servilius Caepio been prevented from carrying his *lex agraria*, shortly after in the same year (103 B C) brought forward his *lex de maiestate* and apparently carried it. It was drawn up in the most general terms, imposing certain penalties on those who should in any way lessen the majesty (*minuere maiestatem*) of the Roman people. It was made to apply (like the laws on *repetundae*) to magistrates and senators only. It was probably meant to check the mutual opposition of magistrates, and possibly in the first instance to supply a means of punishing Caepio. But it certainly gave no definition of *maiestas*: hence all was left to rest on interpretation, in which the Roman pleaders found a congenial occupation for their talents. The court[47] to try cases of *minuta maiestas* was a *quaestio perpetua*. The penalty was the capital one of *aquae et ignis interdictio*. This law afforded powerful protection to the tribunes, in whose person the *maiestas* of the Roman people was especially centred. It was followed by the *lex Varia* of the tribune Q Varius in 90 B C, which extended the operation of the above to the movers and supporters of the Social war. Next, apparently in 81 B C, came the much wider and more detailed *lex Cornelia* of Sulla, by which the *lex Appuleia* was repealed. Its operation extended to the provinces, but it like the earlier laws applied to magistrates and senators only. A definition of the crime was given, bringing under it many and various offences,—for instance, any lessening of the state's resources property or power; opposition to any magistrate, and thereby to the senate[48], to which body Sulla sought to secure the control of all officers of state; exceeding official powers; neglect of duty. It will be seen at once that this law tended to limit the competence of individual magistrates, and also

[47] Maine Anc Law c 10 points out that the functions of the *quaestiones* were determined not by a classification of crimes as such, but by the terms and objects of the several statutes by which they were constituted. See appendix B (6). The *lex Appuleia* may or may not have established a special *quaestio maiestatis*.

[48] For the further development of the law of *maiestas* into a means of protecting the person of the emperor see Meri-

that in its conception of the crime in question it trenched on those of *repetundae* and *peculatus*.

(*q*) Nor is it hard to see how it affected that of the old crime of *perduellio*. The two terms were now practically coextensive, and the real difference lay in procedure only. But this difference was all in favour of *maiestas*, which accordingly superseded *perduellio*. The jury court took the place of the clumsy *comitia*, a *iudicium publicum* of a *iudicium populi*. What had never been a truly technical expression gave way to one which was gradually defined and specialized. Thus a *de facto* revolution in criminal jurisprudence that had long been in progress was quietly accomplished. The old law or laws of *perduellio* were not abolished, and it was no doubt in theory still possible to punish under this name any of the multifarious offences to which it had once regularly been applied. But in practice this was not done, and the rarity of those offences (if any) that could only be treated as *perduellio* and not as *maiestas* caused the older term and forms of procedure to fall into disuse. It was therefore an unfair proceeding to bring Rabirius to trial at all on a charge of *perduellio*; and still more unfair to rake up the antiquated statute that governed the trial by duumvirs. Rabirius might as well or better so far as justice was concerned[49] have been tried on a charge of *imminuta maiestas*, or of *vis* under the *lex Plautia* of 78 B C; for that both this latter and the *lex Cornelia* were passed after the acts laid to his charge had been committed would have caused little or no difficulty[50] at Rome, had it been thought politic to proceed thus. We shall see that in this as in most Roman trials the accusers were

vale c 44, Madvig II pp 276—7. The definition of *maiestas* in the Cornelian law was probably far from precise.

[49] See Maine's Ancient Law c 10.

[50] On the contrary, it was a common proceeding to legislate in view of immediate application to special cases. See Huschke p 172 note 82. Thus we are told by Ascon ad orat pro Scauro p 134 (22 Orell) that the *lex Varia* provided *ut quaereretur de iis quorum ope consiliove socii contra populum Romanum arma sumpsissent*. The way in which Clodius afterwards proceeded against Cicero is well known. See appendix F for the *lex Sempronia*, and compare the lex Pompeia under which Milo was tried for the murder of Clodius. See also de finibus II § 54, pro Cluent §§ 136—7.

influenced by other considerations than justice. To conclude, by the *lex Iulia de maiestate* of B C 46 it is probable that the older offence was still more completely absorbed in *maiestas*: and whether the term *perduellio* still found even in the Digest of Justinian be anything more than (as Rein[51] thinks) an untechnical expression for the higher degree of *maiestas* it is beyond my province to enquire.

D. Register of Cases.

(1) The famous case of Horatius, for a full discussion of which see Prof E C Clark's Early Roman Law §§ 11—17. As to the treatment of a case of *parricidium* as one of *perduellio*, it should be noted that (*a*) Horatius was acquitted of the former by his father, (*b*) Horatius had, by murdering his sister, assumed the right of judgment, which did not belong to him. See in illustration Wharton's Law Lexicon under 'Petit Treason'.

(2) The agrarian law of Sp Cassius (consul 486 BC) so stirred patrician hatred against him that in 485 he was brought to trial. The charge was that he sought to make himself king, and his intended liberality to the Latins and Hernicans made him unpopular with the *plebs*. The form of the trial was probably that of an indictment for *perduellio* preferred against him by the quaestors[1] before the *comitia centuriata*. The elaborate procedure which we find later was most likely not developed at this early date. No duumvirs are mentioned, but there may have been such—the quaestors may have acted in that capacity. From the words *cedente populo* in Cic de re publ II § 60 Zumpt infers that it was a case of appeal to the people from the sentence of the quaestors. The accused was probably not left at large, for we find that on condemnation he was put to death. See Zumpt's Criminal-

[51] Rein p 498.

[1] So they accuse Volscius of false witness in Liv III 24, 25, 29, a case of what Zumpt calls the 'ordinary' criminal procedure. See Clark § 17 on quaestors, Mommsen Röm Staatsrecht II p 600, Lange I pp 385—9, II 514, Varro ling Lat VI § 90.

recht I 1 pp 286—93 and 2 p 330. Livy II 41 with Weissenborn's notes, Dionys VIII 77—8, and my note above on Introd C (*i*).

(3) Into the details of the famous case of M Manlius (384 BC) it is unnecessary to go. The account in Livy is most confused. What is to our purpose is the version of the story in which the duumvirs appear. We are told that they were elected. But whatever were the preliminary steps it is now pretty well agreed that there was only one real trial (*iudicium*) and that this was before the centuries. Probably some misunderstanding of an early narrative of the three hearings has caused the confusion in Livy's narrative. Manlius was put to death. See Livy VI 20 with Weissenborn's notes, and Zumpt I 2 pp 379—86, Lange Röm Alt II 516.

(4) A notable case is that of P Claudius Pulcher who with heedless levity disregarded the auspices and gave battle to the Carthaginian fleet off Drepana, in which action he was defeated with terrible loss. He was brought to trial (248 BC) for *perduellio*, and must have been condemned but for a storm which stopped proceedings at the fourth hearing. The renewal of this accusation was barred by the intervention of tribunes. So he was brought before the tribes and fined 1000 asses for every ship lost. See Schol Bob quoted above, Cic de nat deor II § 7, Livy epit XIX, Suet Tib 2, Valer Max VIII 1 absol § 4, Zumpt I 2 pp 201, 340, Lange II 518.

(5) Very interesting is the attempt made to bring M Postumius Pyrgensis the contractor (*publicanus*) to trial on a charge of *perduellio* for the violence used to prevent condemnation for *peculatus*. But he forsook his sureties and bolted. So the Tribes dealt with him as self-condemned in his absence. See Livy XXV 3, 4, Zumpt I 2 pp 273, 313, 340—1, Lange II 518.

(6) The case of Cn Fulvius in 211 BC is also important. He had when praetor been in command of an army. This he lost in a battle, where he himself shewed great cowardice. A tribune brought him to trial, intending to get him fined by the tribes. Two hearings passed on this understanding; at

the third, so clearly did his misconduct and cowardice appear, the *contio* called for a capital prosecution. When the tribune declared his intention of turning the fine-process into a capital one, the accused demurred, but the other tribunes declared the proceeding legal. The accuser then got a day fixed for *comitia centuriata.* Fulvius found all his hopes vain, and went into voluntary exile, which was then approved and confirmed by the tribes. See Livy XXVI 3, Zumpt I 2 pp 272, 313, 341, Lange II 518.

(7) The case of Q Pleminius (204 BC) should be read in Livy XXIX 8, 9, 16—22. The commission sent to enquire into his impieties and cruelties at Locri was accompanied by two tribunes: and it was probably these two who accused Pleminius and his abettors when brought to Rome, on a charge most likely of *perduellio.* It seems that the *comitia* for the fourth hearing were purposely put off. Pleminius died in prison uncondemned, but the actual circumstances of his end were uncertain. See Zumpt I 2 pp 342—3, Lange II 519.

(8) Two censors, Ti Sempronius Gracchus and C Claudius, were accused in 169 BC of *perduellio* by a tribune, on the ground of their invasion of the rights of tribunes. The real motives were personal pique and discontent with their financial measures. Claudius came very near condemnation: on his acquittal, the tribune let Gracchus go. See Livy XLIII 16, Zumpt I 2 pp 203, 343—4, Lange II 523.

(9) The accusation to avoid which P Popillius Laenas went into exile was probably one of *perduellio.* See appendix F and Zumpt I 2 pp 346—7.

(10) So doubtless was that of L Opimius who, acting on the *sctum ultimum,* suppressed the movements of C Gracchus with violence. With great difficulty he was got off. See Zumpt I 2 pp 347—8, Lange II 524.

(11) Of C Popillius Laenas we are expressly told by Cicero that he was tried for *perduellio,* though in rhet ad Herennium I § 25 it is called *maiestas.* It took place in 107 or 106 BC. His offence was misconduct in the field and the

making of a disadvantageous treaty. Secret voting was introduced for the purpose of securing his condemnation; a step which probably brought *iudicia populi* into greater disrepute than ever. See Cic de legibus III § 36, Zumpt I 2 pp 348—9, Lange II 524.

The above cases are all before the *lex Appuleia de maiestate*. The following is especially interesting, coming as it does after the three laws on that subject, of which we spoke above.

(12) C Verres was prosecuted in a jury court on a charge of *repetundae* in 70 BC. In the *accusatio* composed by Cicero occurs the following remarkable passage (II in Verrem I §§ 8—14). Cicero describes what he would have done had Verres been acquitted in the court of *repetundae*. He says that if he escape this, he will accuse him of *peculatus* (§ 11); if he escape again, he will accuse him of *maiestas* (§ 12); if the jury in this court also acquit him, he will bring him to the bar of the Roman people itself, from whose just indignation he will not escape. Though the word *perduellio* is not used, there can be no other interpretation of the threat. Verres' gross abuse of his official powers, his scourging and putting to death Roman citizens *iniussu populi* would easily have sufficed to establish such a charge. The orator recurs to it again V §§ 173, 178, 183.

E. Of the case of Rabirius and the questions involved in the same.

I begin by quoting the fullest account of the case given by any ancient writer.

Dion Cassius XXXVII 26—28

Τίτος δὲ δὴ Λαβιῆνος Γάιον Ῥαβίριον ἐπὶ τῷ τοῦ Σατουρνίνου φόνῳ γραψάμενος πλεῖστόν σφισι τάραχον παρέσχεν. ὅ τε γὰρ Σατουρνῖνος πρὸ ἓξ που καὶ τριάκοντα ἐτῶν ἐτεθνήκει, καὶ τὰ κατὰ τὸν πόλεμον τὸν πρὸς αὐτὸν οἱ ὕπατοι τότε παρὰ

τῆς βουλῆς προσετετάχατο, ὥστε ἡ γερουσία ἄκυρος ἐκ τοῦ δικαστηρίου ἐκείνου τῶν ψηφισμάτων ἐγίγνετο. κἀκ τούτου πᾶς ὁ κόσμος τῆς πολιτείας ἐταράττετο. ὁ μὲν γὰρ Ῥαβίριος οὐδ' ὡμολόγει τὸν φόνον, ἀλλ' ἄπαρνος ἦν· οἱ δὲ δήμαρχοι τήν τε ἰσχὺν καὶ τὴν ἀξίωσιν τῆς βουλῆς καταλῦσαι παντελῶς ἐσπούδαζον, καὶ ἐξουσίαν ἑαυτοῖς τοῦ πάνθ' ὅσα βούλοιντο ποιεῖν προπαρεσκεύαζον· διὰ γὰρ δὴ τοῦ τά τε τῷ συνεδρίῳ δόξαντα καὶ τὰ πρὸ τοσούτων ἐτῶν πραχθέντα εὐθύνεσθαι τοῖς τέ τι τῶν ὁμοίων ἐπιχειροῦσιν ἄδεια ἐδίδοτο καὶ αἱ τιμωρίαι αὐτῶν ἐκολούοντο. ἡ οὖν γερουσία δεινὸν μὲν καὶ ἄλλως ἐνόμιζεν εἶναι ἄνδρα βουλευτὴν μήτ' ἀδικοῦντά τι καὶ ἐς γῆρας ἤδη προεληλυθότα ἀπολεῖσθαι, πολλῷ δὲ δὴ μᾶλλον ἠγανάκτει ὅτι τό τε πρόσχημα τῆς πολιτείας διεβάλλετο καὶ τὰ πράγματα τοῖς φαυλοτάτοις ἐπετρέπετο. σπουδαί τε οὖν ταραχώδεις καὶ φιλονεικίαι ἀφ' ἑκατέρων περί τε τοῦ δικαστηρίου, τῶν μὲν ὅπως μὴ συναχθῇ, τῶν δὲ ἵνα καθιζήσῃ δικαιούντων, καὶ ἐπειδὴ τοῦτο διά τε τὸν Καίσαρα καὶ δι' ἄλλους τινὰς ἐνίκησε, περί τε τῆς κρίσεως αὖθις συνέβησαν· καὶ ἦν γὰρ αὐτὸς ἐκεῖνος καὶ μετὰ τοῦ Καίσαρος τοῦ Λουκίου δικάζων, οὐ γὰρ ἁπλῶς, ἀλλὰ τὸ δὴ λεγόμενον περδουελλίωνος ὁ Ῥαβίριος ἐκρίθη, κατεψηφίσαντο αὐτοῦ, καίτοι μὴ πρὸς τοῦ δήμου κατὰ τὰ πάτρια, ἀλλὰ πρὸς αὐτοῦ τοῦ στρατηγοῦ οὐκ ἐξὸν αἱρεθέντες. καὶ ἐφῆκε μὲν ὁ Ῥαβίριος, πάντως δ' ἂν καὶ παρὰ τῷ δήμῳ ἑάλω, εἰ μὴ ὁ Μέτελλος ὁ Κέλερ οἰωνιστής τε ὢν καὶ στρατηγῶν ἐνεπόδισεν· ἐπειδὴ γὰρ οὔτε ἄλλως ἐπείθοντό οἱ, οὔθ' ὅτι παρὰ τὰ νενομισμένα ἡ κρίσις ἐγεγόνει ἐνεθυμοῦντο, ἀνέδραμεν ἐς τὸ Ἰανίκουλον πρὶν καὶ ὁτιοῦν σφας ψηφίσασθαι, καὶ τὸ σημεῖον τὸ στρατιωτικὸν κατέσπασεν, ὥστε μηδὲν ἔτ' αὐτοῖς ἐξεῖναι διαγνῶναι.

τοῦτο δέ, τὸ κατὰ τὸ σημεῖον, τοιόνδε τί ἐστι. πολλῶν τὸ ἀρχαῖον πολεμίων τῇ πόλει προσοικούντων, φοβούμενοι μήποτε ἐκκλησιαζόντων σφῶν κατὰ τοὺς λόγους ἐπίθωνταί τινες τῇ πόλει τὸ Ἰανίκουλον καταλαβόντες, ἐνόμισαν μὴ πάντες ἅμα ψηφίζεσθαι, ἀλλά τινας ἀεὶ ἐνόπλους τὸ χωρίον ἐκεῖνο ἐκ διαδοχῆς φυλάττειν. καὶ αὐτό, ἕως μὲν ἡ ἐκκλησία ἦν, ἐφρούρουν, ὁπότε δὲ διαλυθήσεσθαι ἔμελλε, τό τε σημεῖον καθῃρεῖτο καὶ οἱ φύλακες ἀπηλλάσσοντο· οὐ γὰρ ἐξὴν μὴ φρουρουμένου τοῦ χωρίου ἐκείνου οὐδὲν ἔτι χρηματισθῆναι. τοῦτο δὲ ἐν

μόναις ταῖς κατὰ τοὺς λόχους ἀθροιζομέναις ἐκκλησίαις ἐγίγνετο, ὅτι τε ἔξω τοῦ τείχους καὶ ὅτι πάντες οἱ τὰ ὅπλα ἔχοντες ἀνάγκην εἶχον ἐς αὐτὰς συνιέναι· καὶ ἔτι καὶ νῦν ὁσίας ἕνεκα ποιεῖται.

οὕτω μὲν δὴ τότε ἥ τε ἐκκλησία καθαιρεθέντος τοῦ σημείου διελύθη καὶ ὁ Ῥαβίριος ἐσώθη· ἐξῆν μὲν γὰρ τῷ Λαβιήνῳ καὶ αὖθις δικάσασθαι, οὐ μέντοι καὶ ἐποίησεν αὐτό.

(*a*) C Rabirius an aged senator was brought to trial[1] early in B C 63 for the murder of Saturninus. Thirty six full years had gone by since that turbulent demagogue had been cut off by authority of the senate. Rabirius had confessedly taken part in the suppression of the rising of Saturninus, and had according to one account afterwards shewn a needless and brutal[2] exultation at the tribune's fall. But it does not seem to have been proved or even probable that it was he who struck[3] the fatal blow. Indeed a slave had been[4] publicly recognised as the slayer of Saturninus and duly rewarded for the deed. But that on which Rabirius and others who took the same side relied for their security was certainly the freedom from responsibility supposed to be insured[5] by the *sctum ultimum* to those who acted under cover of that decree.

(*b*) But it was just this presumed right of the senate that the democratic party at Rome, now headed by C Julius Caesar, were determined to call in question. If they could make an example of one of the agents employed by the senate in the suppression of Saturninus, they would have effected what was all-important for their party ends: the

[1] Suet Iulius 12 *subornavit etiam qui Gaio Rabirio perduellionis diem diceret, quo praecipuo adiutore aliquot ante annos Luci Saturnini seditiosum tribunatum senatus coercuerat, ac sorte iudex in reum ductus tam cupide condemnavit ut ad populum provocanti nihil aeque ac iudicis acerbitas profuerit.*

[2] liber de vir illustr 73 § 12 *caput eius Rabirius quidam senator per convivia in ludibrium circumtulit.*

[3] He may have taken a leading part, as Scipio Nasica though *privatus* did against Tib Gracchus.

[4] Pro Rab § 31. But whether this recognition was anything more than a cautious move on the part of the *optimates*, to insure themselves against danger such as befel Rabirius later, may be doubted. See Huschke p 513.

[5] See appendix A.

senate would be lowered and weakened by the loss of the weapon on which it had become accustomed to rely, and thereby a great fear taken off 'popular' tribunes, whose designs the senate had been able to checkmate by the destruction of the leader.

(*c*) It will be seen that the acts for commission of or participation in which somebody was to be brought to trial were either lawful and unpunishable or criminal in the highest degree and rendering their perpetrator liable to the uttermost penalties of the law. The real question was the constitutional one as to the quality of the acts. And as from the point of view of the *populares* the slaughter of a tribune was a crime exceptionally heinous it follows that the accusation could only be brought under one of two heads,—*maiestas* or *perduellio*. But *maiestas* was tried in one of the permanent jury courts, the members of which, being taken from the wealthier classes and representing[6] the 'party of order', were sure to acquit a man accused on that charge. There remained *perduellio*, in which two forms of procedure were possible—the direct tribunician, by the four hearings, and the ancient one by duumvirs, subject to the right of appeal. Of these the latter was chosen, probably with the view of more effectually frightening the senatorial party by means of the long-disused barbarous penalty named in the ancient law.

(*d*) The victim selected was old and insignificant, but in all probability one who had in his time done[7] other deeds of violence than that now laid to his charge, and so not without enemies. He had however hitherto escaped the hand of the law. An accuser was found in the tribune T Atius Labienus, ready to avenge the death of an uncle who had taken part with Saturninus and lost his life on that occasion. Labienus then was to accuse Rabirius of *perduellio* before duumvirs.

(*e*) Such was the resolution of the democratic leaders.

[6] See pro Rab §§ 24, 27, Zumpt I 2 p 389, Huschke p 521.

[7] See the expressions used in pro Rab § 8, where of course the accusations are not put from the accuser's own point of view. Mommsen bk v c 5 (IV pp 167—8) puts this more confidently than I have done.

But in their endeavour to carry this into effect they encountered the strongest opposition from the senatorial party, to which the consul Cicero had now attached himself. In the party struggles[8] to which this 'burning question' gave rise Cicero no doubt took a prominent part and exposed with all his oratorical skill the gross injustice of reviving an obsolete procedure in order to try a man for the acts of more than six and thirty years ago. What form these struggles took I cannot gather from the scanty surviving evidence. But it seems probable that they were brought to an end by a bill declaring in general terms[9] that inquiry should be made into the circumstances of Saturninus' death, and perhaps providing further that this should be done by appointment of duumvirs to try those accused in connexion with the affair on a charge of *perduellio*. This bill Labienus laid before the *comitia tributa* and passed[10] into law. It should seem that Cicero's opposition was successful so far that he induced the tribes to modify[11] the penalty, probably substituting the *aquae et ignis interdictio* for the barbarous execution of the old law. I conjecture that this was partly a trick devised by Caesar: they gave up to Cicero that which public sentiment would not have permitted them to put in practice, and were thereby more easily able to carry their main point—that the duumvirs should be nominated by the *praetor urbanus*[12]. The trial was soon proceeded with. C Caesar himself and his uncle L Caesar were nominated duumvirs: the lot fell upon the former, who with eager partiality (*cupide*) at once gave sentence against

[8] I cannot agree with Huschke pp 522—3 as to the σπουδαί etc mentioned in Dion Cassius. I hold that the second contention (περί τε τῆς κρίσεως αὖθις συνέβησαν) is most naturally referred to the *result of the trial*, which we know would be made a party matter.

[9] See note above on Introd C (*g*).

[10] This is the view of Mommsen Röm Staatsrecht II pp 599, 600, Huschke p 522, Zumpt I 2 pp 390—2. Lange II 525 thinks there was no *plebiscitum* actually passed.

[11] Huschke p 523 seems to think that this was done by a *sctum*. I do not understand how.

[12] This officer is no doubt meant by Dion, and he would probably also preside at the *comitia centuriata* after the appeal. But surely Metellus Celer cannot have been in that office. His acts are quite inconsistent with any hostility to Rabirius. But Zumpt I 2 p 393 makes him *praetor urbanus*.

the accused. Hereupon Rabirius appealed to the people. That this means the people in their centuries[13] is clear, for since the Valerian laws that assembly had held the appellate jurisdiction once exercised by the curies. But whether it was necessary after the duumviral sentence to go through the whole process of the four hearings, as in one of the 'extraordinary' tribunician trials, is so far as I know a question which there are no means of answering. Anyhow the assembly of the centuries met, and voting seems to have begun; for we are told that the rejection of the appeal was imminent when the praetor Metellus Celer ran and pulled down the red flag, after which[14] the proceedings necessarily came to an end.

(*f*) Thus far we have met with no difficulty of importance. Here we are brought face to face with the problem on which so many scholars have of late exercised their wits. Formerly it was assumed without hesitation that the surviving speech of Cicero was delivered before the centuriate assembly on the occasion of the appeal. Since Niebuhr[15] this has been a disputed question, and the balance of expert opinion seems to incline in favour of the other view—that it was delivered at some stage of a fine-process, which was brought on after the capital process had miscarried. In this view I had better at once say that I concur. I proceed to consider the evidence on which my conclusion is based; first the external, then the internal.

(i) External.

1. Dion says that the hauling down of the flag saved Rabirius: Labienus might have brought him to trial again, but he did not do so. Here I believe him to speak of a renewal of the charge of *perduellio*; which was no doubt as he says permissible[16] by statute [*legibus*],

[13] Huschke p 524.

[14] See appendix I.

[15] Zumpt I 2 note 97 and Rein p 497 adhere to the old view: Lange II 552, III 242, Huschke pp 515—28, Madvig II p 304, Mommsen Röm Staatsrecht III p 598, adopt Niebuhr's view with some modifications.

[16] This is admitted by Zumpt I 2 pp 265, 396. See Huschke p 524. Thus

though forbidden by usage [*moribus*]. Still it remains true that he makes no mention of a *multae irrogatio.* Dion wrote in the latter part of the second century A D or the earlier part of the third.

2. Suetonius, when he says that the spite of Caesar served Rabirius better than anything else in his appeal to the people, is also thinking of the trial for *perduellio.* But his words surely imply either that the people acquitted Rabirius or that they were inclined to do so. Now Dion says the very contrary,—that he would have been convicted before the people also. There is therefore ground for suspecting that neither of these writers understood clearly what he was writing about. The political bearing of the trial is clear in both accounts, but the details are slurred over by Suetonius, who only gives us enough information to throw some discredit upon Dion. Suetonius wrote in the earlier part of the second century A D.

3. Cicero writing to Atticus in 60 B C gives a list of 12 speeches which he was editing. They were to be a collection of consular speeches of political rather than forensic interest. Of these the fourth[17] is for Rabirius. But whether the surviving speech is that referred to cannot be determined except on the supposition that he delivered and edited no other.

4. Cic in Pisonem § 4 (delivered 55 B C) says *ego in C Rabirio perduellionis reo XL annis ante me consulem interpositam senatus auctoritatem sustinui contra invidiam atque defendi.* Now this description would apply very well to the present speech. But the words *perduellionis reo* do not prove that the speech,—even granting that it is referred to—is the one delivered before the assembly of centuries on the appeal from

Valer Max VIII 1 absol § 4 says of the case of Appius (he means Publius) Claudius that he was preserved from condemnation by a storm, and the trial not renewed. But we know that he was afterwards fined by vote of the tribes.

[17] ad Att II 1 § 3 *quarta pro Rabirio.*

the duumvirs. They contain a rhetorical description of Cicero's whole action in the matter. The title of the speech itself may have come down from Cicero himself. Even then it may as Huschke[18] says have been given with an eye rather to the striking feature of the whole case than to the new phase upon which the case had (it is thought) now entered. But it is more likely that it was given by a copyist, chiefly with intent to distinguish it from the speech *pro C Rabirio Postumo.*

5. Cic orator § 102 says[19] that the real issue involved in the case of Rabirius was whether the honour and greatness (*maiestas*) of Rome should be maintained ('asserted' or 'vindicated') or not: hence he gave the rein to his power of exaggeration. This also would apply to the present speech. But it speaks only of the case of Rabirius generally, and it tells us nothing as to when or where this or any other speech was delivered.

It will be seen that the external evidence is on the face of it either neutral or unfavourable to the view in which I have declared my concurrence. But it will also be seen that it is not of such a nature as to overpower good internal evidence opposed to it, if such be forthcoming. And it will I think be admitted that Cicero's own references to his defence of Rabirius are not such as he would have made to a pleading in which he had been unsuccessful, as he seems to have been in speaking before the centuries.

(ii) Internal.

1. In § 8 Cicero directly mentions *multae irrogatio.* The word *eadem* signifies[20] that the same comprehensive bill of penalties recited all the minor charges just men-

[18] Huschke p 526.

[19] *ius omne retinendae maiestatis Rabiri causa continebatur: ergo in omni genere amplificationis exarsimus,* with which compare § 72. Quintil VIII 4 deals with *amplificatio.*

[20] Here I am in agreement with Huschke p 515. And in general I think the matter of §§ 6—8 suits far better with the theory of a fine-process than of one for *perduellio.*

tioned as well as that with which it stands in more immediate connexion. This will hold whether we read *perscriptum* or *praescriptum*, though I prefer the former. It is a very forced interpretation[21] to refer the *multae irrogatio* to some other case—e g that of C Curtius (§ 8), which was almost certainly tried before the jury court of *peculatus*. If my view of this passage be correct, this evidence is of itself almost enough to establish my view.

2. The references in §§ 10, 17, to Cicero's previous action, so bitterly complained of by Labienus, are if taken naturally[22] rather to be referred to the consul's whole opposition to the trial than to the mere lightening of the penalty[23] of *perduellio* which Cicero and his party had probably succeeded in effecting. The reason why Cicero so thrusts the penalty question to the front is manifest. The whole case was essentially political, and the most powerful feeling upon which it was now possible for the orator to work was undoubtedly the Roman citizen's pride in his exemption[24] from horrible and degrading punishment. Hence he brings in the subject of the *perduellio* trial in such a way as to justify a digression on the terrors of the scourge and the cross, which, in defiance of the laws meant to guard the person of a Roman, a tribune would have brought back again but for the humanity of a consul. [Huschke p 517 calls attention to the use of the perfect in § 17 *esse depulsum*, *neglexisti*, § 28 *putavit*, though in more vivid passages presents are used, as §§ 11—13. Perhaps *conatus es* opposed to *facis* in § 13 is the most striking instance. But I do not lay much stress on this point. Perhaps § 16 *auribus* and *mentio* refer to what Labienus had before proposed.]

3. It is perhaps a stronger argument[25] than the last,

[21] Given by Zumpt 1 2 note 97 (p 472).

[22] See Huschke pp 516—7.

[23] The view of Zumpt 1 2 pp 390—2.

[24] See appendices E and F.

[25] From Huschke p 518.

that the matter of §§ 11—16 must have filled a far more considerable place in the speech before the centuries. Surely there would have been no less said about the cruelty of Labienus' proposals, probably far more about the obsoleteness of the ancient procedure, and the irregular nomination of the duumvirs must have been one of the main points of attack. But this last is in our speech only casually referred to in § 12.

4. Whether the *contio* mentioned in § 25 be one in which Cicero is at the time[26] speaking, I cannot say. Huschke[27] is confident that it is. I am inclined to think that it refers to one of the earlier hearings of what I believe to have been a fine-process. The words *quam tu habes* would prove Huschke's view right were there not *quod habuit domi suae* in the preceding section.

5. The half-hour limit (§§ 6, 9), assigned by Labienus[28] to the speech of Cicero, suits better with procedure before the tribes (where the tribune could preside) than with that before the centuries. Or it may be an indication that the speech was delivered before a *contio* at one of the three preliminary hearings of a popular trial. If so, and the passage § 17 *liberum tempus dabitur* etc be rightly referred to a forecast of the fuller speech on the occasion of the fourth hearing, then the supposition[29] that this speech falls in one of the *contiones* of the fine-process gains great probability. But I am in doubt on this point. The limitation was probably in any case an arbitrary act, but it was clearly based on the tribune's power of *intercessio;* and this we know could be exercised[30] in any assembly.

[26] Quintilian (quoted in my note) seems to think that it is.

[27] Huschke pp 517, 527.

[28] Huschke thinks that he allowed Hortensius and Cicero half an hour each.

[29] Huschke pp 527—8. It is to be remembered that in this case the tribune would preside. See on § 6 *comparato.*

[30] Lange I 843. For cases even before the centuries see Livy III 24 § 7, 25 § 2, 29 § 6, IV 50 § 6, etc. Becker II 3 p 113.

6. In § 1 we find *defensio capitis famae fortunarumque omnium*, in § 3 *supplicium*, in § 5 *dimicatio capitis famae fortunarumque omnium*, and have mention of Rabirius' *salus* to be preserved, and of his *vita* being staked on the popular vote. [§§ 10—17 do not concern us here, and have been dealt with above]. In §§ 3, 31 we hear of *supplicium*, in § 31 *capitis citantur*. But in the peroration § 36 we learn that Rabirius fears *famae vulnus* and *impetus civium*. In § 37 we have clear reference to exile, which would deprive him of honourable death and burial at home. Now we know what extravagant language Cicero could employ when it suited him, and I do not think that there is anything in all this to shew that the life of Rabirius was really in danger[31] from the result of the trial at which this speech was delivered. The peroration seems even in its fragmentary state to contain evidence[32] to the contrary effect. And Cicero is appealing for an old man (§ 2) who could not in the course of nature (§ 37) live many more years. The real question is, what connexion can there be between *multae irrogatio* on the one hand and exile and *infamia* on the other? This I have considered in an appendix (K), and arrived at the conclusion that there was such a connexion in some cases at least. Holding this view, I cannot but regard the expressions in the peroration as sufficient to prove that the stronger ones which come earlier in the speech are intentionally overdrawn. I cannot believe that the references to loss of *caput* prove the speech to have been delivered before the centuries, or that the risk to Rabirius' *vita* means any more than the possibility of a disastrous change in the conditions of his life.

7. Huschke remarks[33] that throughout the speech

[31] Of course, supposing the old penalty to have been removed (as suggested above), this would not shew that the speech was not delivered before the centuries. But it would shew that it might just as well have been before the tribes, if *caput* was in any way thereby endangered.

[32] Huschke p 516.

[33] p 518.

Labienus is treated as accuser. Now so far as we know the procedure by duumvirs from the only case recorded —that of Horatius—it seems that the appeal from their decision introduced a direct contest[34] between them and the accused. In fact they are the accusers. Now, however unwilling Cicero may have been to make any reference to Caesar, he can hardly have avoided doing so in the speech before the centuries. This he would very likely tone down in a subsequent edition, but I do not think that he would omit[35] it altogether. The *auctor huius iudici* of § 33 might be Caesar, but is more probably Labienus, who by a *rogatio* had originally set on foot the trial.

Such is the evidence, scattered meagre and inconclusive, on which a conclusion has to be based. I have endeavoured to state it fairly: and I think that the delicate balance of probability inclines to the side I have taken. I hold that the speech edited and preserved by Cicero was one in which he felt that he had done justice to his powers, his effort in a cause won. Whether[36] Labienus withdrew from the trial after this speech, or whether a vote was taken and Rabirius saved, I cannot say. But that he was saved I cannot doubt. I have now only to acknowledge with gratitude my debt to Professor Huschke, to whom I owe so much of the help necessary in treating of this very difficult subject.

F. Abstract of the Speech.

Huschke's remarks, pp 529—32.

There are two sides to the trial, and Cicero speaks (*a*) as advocate

§§ 1—5. A. *Exordium.* Cicero justifies his own conduct in undertaking the defence, and points out that the object aimed at by the accusers is not to crush a harmless

[34] Livy 1 26 §§ 6, 8.

[35] As Zumpt 1 2 p 396 seems to think. I follow Huschke p 522.

[36] Huschke p 532 decidedly takes the former view, and I am inclined to agree with him.

defending Rabirius (β) as consul defending the constitution. The latter function is the more important. Hence the greater part of the speech is devoted to this.

old man but to weaken the powers of the senate and the consuls in dealing with lawless disturbers of the public peace. He claims the sympathy and support of the citizens in his maintenance of a cause which is emphatically that of constitutional authority and the best interests of Rome.

§§ 6—31. B. *Refutatio.*

He next complains of the unfair restrictions imposed on him by Labienus; and proceeds to clear away the prejudice raised against his client by a number of irrelevant charges. These, he declares, either (*a*) have been already disproved, or (*b*) have never been brought forward in a court of law, or (*c*) are too grotesquely hideous too filthy and in fact too improbable to be seriously entertained. With a passing reference to the charge against Rabirius of having killed Saturninus, he goes on to declare that he is proud of having opposed the revival of an obsolete and barbarous procedure. [He then flies off into a digression, contrasting his own conduct with that of the accuser and vehemently protesting that he the consul has a far better right than Labienus the tribune to the honourable appellation *popularis*.] He will for the present waive the questions of legality and custom. §§ 6—17.

If the consul is to justify the killing of Saturninus against the efforts of Caesar's partisans and the prepossessions of the people, he must shew himself to be a true *popularis*. Hence this digression. He appeals to the Roman pride in *libertas*, and artfully contrasts Gracchus with that 'lesser light,' Labienus.

He now deals directly with the affair of Saturninus. It has been already proved that Rabirius was not the slayer of that demagogue. Were this not so, he would be proud to admit the truth of

the charge. As he cannot admit the fact, he will go as far as he can, and admit the intent. He would rather argue that Saturninus was rightfully put to death. §§ 18, 19. [Here is a lacuna.]

[Here probably followed some description of the revolutionary proceedings of Saturninus.]

The defence is resumed in the form of a narrative in which stress is laid upon all the points in which any justification can be found for the conduct of Rabirius on the occasion in question. He only did what all the best men in Rome did. He acted as a true patriot and accepted a responsibility which it would have been cowardly to shirk. The decisions of the law courts shew the opinion of recognized public authorities on the cause of Saturninus. To condemn Rabirius now is to stain with ignominy the names of all the men of whom Rome was then proud—even that of her great hero Marius. That Marius is dead, is no answer to this: we should reverence the dead, and honour as we would be honoured. Besides, we know that the real slayer of Saturninus has been already publicly recognized and rewarded. §§ 20—31. [Here is a lacuna.]

[He probably defended the Senate against the charge of having acted not in a patriotic but a party spirit in 100 B C or now. He then argues, as you backed up the Senate in the matter of the law of Rullus, so now shew the same sobriety and wisdom.]

§§ 32—38. C. *Peroratio.* He then points to the need of a firm and patriotic policy in these critical times, declares that he will do his duty like a man, and concludes with a pathetic personal appeal for mercy to Rabirius.

Here the two sides to the trial are very naturally treated in the inverse order, so as to keep the regular appeal for the accused to the last.

M TULLI CICERONIS

PRO C RABIRIO [PERDUELLIONIS REO]

AD QUIRITES ORATIO

I. 1. Etsi, Quirites, non est meae consuetudinis initio dicendi rationem reddere qua de caussa quemque defendam, propterea quod cum omnibus civibus in eorum periculis semper satis iustam mihi caussam neces-

§ 1. **rationem**] Cicero speaking before a hostile audience saw the necessity for this ingenious justification of his conduct in undertaking the defence of Rabirius. The introductory reference to his usual practice need not be taken seriously. The opening of the speech *pro Roscio Amerino* shews that he had already begun a defence thus: he did it again in the *pro Murena* later in this very year: and the *pro Sulla* shews that he continued the practice. And it is quite in keeping with the spirit of Roman criminal trials.

defendam] to conduct a prosecution was looked upon as a thankless and generally a revolting task. But to defend a fellow-citizen was a congenial task and a means of earning gratitude and popularity. See div in Caecil §§ 1, 5. We see then that the word *defendam* here is emphatic.

periculis] this is the regular expression for trials on criminal charges, used no doubt with an eye to the grave penalties incurred by the accused if convicted. See for instance pro Mur §§ 5, 10, Quintil VI 1 §§ 21, 22, 36.

caussam necessitudinis] here I take the genitive as in div in Caecil § 61 to express the simple object, 'ground *for* close connexion'. He means 'let a citizen be prosecuted on a criminal charge, that is enough to make me ready to befriend him'. It might be a genitive of more specific definition (Madvig § 286), making a previous *necessitudo* the *caussa*, but I think not.

praecipue meus est, studium vero conservandi hominis commune mihi vobiscum esse debebit.

II. Sic enim existimare debetis, Quirites, post hominum memoriam rem nullam maiorem, magis periculosam, magis ab omnibus vobis providendam neque a tribuno plebis susceptam neque a consule defensam neque ad populum Romanum esse delatam. agitur enim nihil aliud in hac caussa, Quirites, nisi ut nullum sit posthac in re publica publicum consilium, nulla bonorum consensio contra improborum furorem et audaciam, nullum extremis rei publicae temporibus

§ 4. **conservandi**] that is, [the anxiety to] save him from the fate of a dishonoured exile. See Introd E (*f*), appendix C, H, K.

ab omnibus vobis] Draeger, Historische Syntax I § 189 p 428, shews that by the use of the ablative with *ab* (rather than the dative) after the gerundive the stress is laid on the *vobis*. So pro Sest § 41 *a consulibus meam caussam suscipiendam esse dicebat*, de imp Cn Pomp § 34, pro Sulla § 23. The use is very rare in later writers.

providendam] to be 'guarded against', a common sense. So de imp Cn Pomp §§ 20, 29, ad fam VI 10 § 6, IX 18 § 4, Ter Andr 208.

defensam] 'resisted'. As in pro Mur § 5 *de civium periculis defendendis*, we see that what is meant is the undertaking to defend a man in a trial. The word sounds rather awkward with *rem*, but it must be remembered that *rem* really means the charge brought by Labienus; and we actually have *crimen defensum* in Livy XLII 48 § 2. It is no more than a strong instance of the original meaning 'ward off'. Compare de off III § 74 *si is, qui non defendit iniuriam neque propulsat cum potest, iniuste facit.*

publicum consilium] this I take to mean policy adopted in the common interest of the state, a 'common policy' or 'state policy' as opposed to the selfish aims of unscrupulous demagogues. Compare Brutus § 329 *pacis spem a publico consilio esse exclusam*, de legibus III § 28 (quoted above), Livy III 63 § 10 (of a contest between the tribunes and senate) *ne ita omnia tribuni potestatis suae inplerent ut nullum publicum consilium sinerent esse. ita demum liberam civitatem fore, ita aequatas leges, si sua quisque iura ordo, suam maiestatem teneat.* Nor can I feel sure that this is not the meaning in pro Sest § 42, though Halm makes it = the senate, as it sometimes does. But I must also admit that it is possible to refer all these passages to the senate as the State Council.

improborum] the demagogues.

perfugium et praesidium salutis. 5. quae cum ita sint, primum, quod in tanta dimicatione capitis famae fortunarumque omnium fieri necesse est, ab Iove optimo maximo ceterisque dis deabusque immortalibus, quorum ope et auxilio multo magis haec res publica quam ratione hominum et consilio gubernatur, pacem ac veniam peto, precorque ab eis, ut hodiernum diem et ad huius salutem conservandam et ad rem publicam constituendam illuxisse patiantur. deinde vos, Quirites, quorum potestas proxime ad deorum immortalium numen accedit, oro atque obsecro, quoniam uno tem-

salutis] a subjective genitive, to be expressed by 'for'. Compare pro Sulla § 79 *munite communem arcem bonorum, obstruite perfugia improborum*, and see Halm and Wilkins on de imp Cn Pomp § 39 *avaritiae perfugium*. The word means the 'weal' of the state, as in de re publ I § 51 *certe in optimorum consiliis posita est civitatium salus*.

§ 5. **Iove** etc] see div in Caecil § 43. Demosthenes both begins and ends his speech on the Crown with a similar invocation.

quorum ope etc] Verg Aen II 352 *de quibus imperium hoc steterat*. See also Aristoph Clouds 587—9.

pacem ac veniam] 'a kindly and gracious hearing'. Compare pro Fonteio § 30 [20] *illae* (gentes) *in bellis gerendis ab dis immortalibus pacem ac veniam petunt*, and the common use *pace tua dixerim*. I think what is asked is (a) that they will receive his petition in a kindly spirit, not prejudiced against Rabirius (*pacem*), and (b) that they will be indulgent (*veniam*). Of course the two really form but one notion. Compare also Livy I 31 § 7, XXXIX 10 § 5, and see Conington on Verg Aen I 519, III 144, 261, 370, XI 101.

precor] compare the *precatio* in pro Mur § 1.

constituendam etc] to 'set the commonwealth on a firm basis', that is, to strengthen or establish the government,—by confirming the right of the senate to act promptly and summarily in great emergencies, which was of course the real question at issue in this trial. For the word compare de legibus III § 42 *nihil est enim exitiosius civitatibus, nihil tam contrarium iuri ac legibus, nihil minus civile et humanum, quam composita et constituta re publica quicquam agi per vim*.

potestas etc] compare the words addressed to the jury in pro Mur § 83, and the comparison of their power to that of the gods in § 2 of that speech and pro Cluent § 195.

pore vita C Rabiri, hominis miserrimi atque innocentissimi, salus rei publicae vestris manibus suffragiisque permittitur, adhibeatis in hominis fortunis misericordiam, in rei publicae salute sapientiam, quam soletis.

6. Nunc quoniam, T Labiene, diligentiae meae temporis angustiis obstitisti meque ex comparato et constituto spatio defensionis in semihorae curriculum coegisti, parebitur, et, quod iniquissimum est, accusatoris condicioni et, quod miserrimum, inimici potestati. quam-

vita...salus] Kayser after earlier scholars inserts *et* before both these words, to improve the run of the sentence. But without it the latter is more identified with the former, which I prefer.

manibus] they would hand in tablets, each man marking his own according to the verdict he found. See § 32.

suffragiis] the *lex Cassia* [called *tabellaria*], carried in BC 137 by L Cassius Longinus a tribune, introduced ballot voting in all trials before the assembled people with the sole exception of cases of *perduellio*. In BC 107 the tribune C Caelius got this exception removed, principally with intent to take vengeance on an individual. See Mommsen Geschichte des Römischen Münzwesens p 636 No 279, and in particular de legibus III §§ 35, 36, the passage (γ) at head of Introduction.

in...fortunis...in...salute] this is the common idiom, where we should say 'in dealing with'....., 'in the case of'.....Compare for instance § 7, de imp Cn Pomp § 56 *in salute communi*.

§ 6. **diligentiae**] the care and labour of a thorough defence, which would naturally have been shewn in a longer speech. See § 9.

comparato] arranged, 'appointed'. Very common, compare I in Verrem § 42, pro Balbo § 31. Whether there was a customary limit to the length of speeches in a *iudicium populi* I do not know. Probably this was regularly done by the president of the court. Huschke p 527 refers the words to a private arrangement of time between Cicero and Hortensius.

spatio] from its meanings, 'room', 'space', 'extent', we may feel the force of the intended opposition to *curriculum*, which here seems to signify a course more marked out and limited. See § 30.

semihorae] see Introd E (*f* ii)[6].

condicioni] the 'terms' imposed by the prosecutor. Compare pro Mur § 60, pro Plancio § 41, pro Cluent § 42, Tacitus Agr 27, and see note on § 15 below.

potestati] Labienus was tribune. See § 28.

praescriptione] 'marking out', 'limitation'. See pro Caecina § 8

quam in hac praescriptione semihorae patroni mihi partes reliquisti, consulis ademisti, propterea quod ad defendendum prope modum satis erit hoc mihi temporis, ad conquerendum parum. 7. nisi forte de locis religiosis ac de lucis, quos ab hoc violatos esse dixisti, pluribus verbis tibi respondendum putas: quo in crimine nihil est umquam abs te dictum, nisi a C Macro obiectum esse crimen id C Rabirio. in quo ego demiror meminisse te quid obiecerit C Rabirio Macer inimicus, oblitum esse quid aequi et iurati iudices iudicarint. III. 8. an de peculatu facto aut de tabu-

praescribat. In § 38 below we have *praestitutum.*

conquerendum] for the word see pro Mur §§ 7, 55. The complaint he would have liked to amplify in this speech referred no doubt (as the words *consulis ademisti* shew) to the weakening of the *imperium* which would ensue on the condemnation of Rabirius. See on §§ 2, 9.

§ 7. **religiosis**] 'consecrated' by religious awe. See div in Caecil § 3. It seems that Macer had charged Rabirius with some profanation of holy places, probably in the hurry and confusion of the attack on Saturninus and his crew.

quo in crimine] 'in handling which charge'. *crimen* = a particular head or 'count' of an accusation. But I do not feel sure that Labienus himself did more than allude to it in passing: of course Cicero would eagerly seize on the smallest insinuation when he felt able to answer it.

C Macro] this is Gaius Licinius Macer, a wordy and fluent historian, but notable as having studied ancient records at first hand. As an orator we are told by Cicero (Brutus § 238) that he was very careful in his pleadings, but far from a brilliant speaker: while his life character and looks told greatly against him. In the year B C 66 Cicero as praetor presided in the court of *repetundae*, and Macer was brought before him. Whether sentence was actually passed on him, is not clear: anyhow he was practically condemned, and committed suicide. Thus his accusation of Rabirius must have been at least three years before the date of this speech.

quid...iudicarint] Whatever the charge, Rabirius seems to have been acquitted.

§ 8. **peculatu**] see appendix B.

facto] it is curious that Cicero should use this expression if his client was innocent of that crime. Hence Lambinus suspected the word with some reason. But I think it merely expresses the allegation of Labienus.

tabulario] Mr Burn (Rome and the Campagna pp 97—8) points

lario incenso longa oratio est expromenda? quo in crimine propinquos C Rabiri iudicio clarissimo, C Curtius, pro virtute sua est honestissime liberatus, ipse vero Rabirius non modo in iudicium horum criminum, sed ne in tenuissimam quidem suspicionem verbo est umquam vocatus. an de sororis filio diligentius respondendum est? quem ab hoc necatum esse dixisti, cum ad iudici moram familiaris funeris excusatio quae-

out that most of the large public buildings and temples at Rome probably had record-rooms attached to them. Thus we hear of them in the *atrium Libertatis* and the temples of Jupiter Capitolinus, of Ceres Liber and Libera, and especially in that of Saturn. Besides these, a grand *tabularium* was erected and dedicated B C 78, which is supposed to have overlooked the Forum. In such places were preserved not only state documents but also records of private transactions. What *tabularium* is here referred to we cannot tell.

incenso] Cicero mentions the burning of a record-office again in de deorum natura III § 74 *sessum it praetor: quid ut iudicetur? qui tabularium incenderit. quod facinus occultius? id se Q Sosius splendidus eques Romanus ex agro Piceno fecisse confessus est.* This may refer to the case mentioned in pro Arch § 8, but I doubt it.

propinquos] this word seems to be, more nearly than any other in Latin, equivalent to our 'relative'. I will not discuss it here in its various shades of meaning. Good references for the study of the word are de off I §§ 53—4, 58—9, Laelius § 19, philippic VIII § 1, pro Rosc Am § 96, Sallust Iug 10 § 3, Verg Aen II 86, Gellius XX 1 § 40. The notion of 'intimacy' comes out well in Cic ad fam IV 12 § 3.

C Curtius] referred to again in pro Rab Post § 45 *hem, Postume, tune es C Curti filius, C Rabiri iudicio et voluntate filius, natura sororis?* We see that Rabirius had before the date of that speech (B C 54) adopted a son of a sister who had married this Curtius. But I see no proof that he had done so at the date of this speech (B C 63), indeed the passage just quoted sounds to me very feeble if the adoption had taken place some 10 years previously. The marriage would have made them *adfines.* Perhaps it is to this marriage relationship that Cicero is referring in the word *propinquos.*

sororis filio] I see no proof that this is the same sister that Curtius married. Even if it be so, the *filius* is clearly not the one adopted by old Rabirius, who was still living in B C 54 as Rabirius Postumus.

familiaris funeris] compare in Vatin § 31. That this would be a

reretur. quid enim? est [tam] veri simile [quam] cariorem huic sororis maritum quam sororis filium fuisse, atque ita cariorem, ut alter vita crudelissime privaretur, cum alteri ad prolationem iudici biduom quaereretur? an de servis alienis contra legem Fabiam retentis aut de civibus Romanis contra legem Porciam verberatis aut necatis plura dicenda sunt, cum tanto studio C Rabirius totius Appuliae, singulari voluntate Cam-

valid plea to stay proceedings is clear from the words of Ulpian quoted in the Digest II 4 §§ 2, 3 *praeterea in ius vocari non debet .....neque funus ducentem familiare iustave mortuo facientem*, which shew that it held good in the civil law. Indeed it seems that a man could not in such circumstances be called upon to perform any public act. That he need not appear in his place in the army even after taking the oath is clear from the old form quoted by Cincius (in Gellius XVI 4) giving the following exceptions *nisi harunce quae causa erit: funus familiare feriaeve denicales, quae non eius rei causa in eum diem collatae sint, quo is eo die minus ibi esset*, etc. Some such excuse as this is probably meant in Cic de domo § 45 (quoted at head of Introduction).

excusatio] 'plea'. Compare pro Mur § 47 *morbi excusationi*, philippic VIII § 1 *propinquitatem excusavit*, pro Sestio § 112, de domo § 45, Livy XXXVIII 52.

quid enim etc] Kayser follows Garatoni in bracketing the words *tam* and *quam* here, which spoil the obvious meaning; and I am driven to accept this in itself unsatisfactory solution of the difficulty. To read *quid enim est tam veri simile quam* and take it all for sarcasm seems to me forced and inappropriate to a speech before the people.

crudelissime] this sounds all very well, but there were probably plenty of men at Rome in that age who would have done the same any day.

cum] Kayser brackets this, following Lambinus and Halm; but it gives the good sense of 'merely because'.

alteri] that is, the *sororis maritus* (Curtius) mentioned above. I see nothing to shew that this trial which it had been sought to delay was in any way connected with the cases of *peculatus* and *incendium* above.

biduom] emphatic.

legem Fabiam] see appendix D.

legem Porciam] see appendix E.

Appuliae] Rabirius evidently had interest in this district: perhaps, as Turnebus suggests, he had large estates there. See Introd E (*d*).

Campaniae] we have mention of *domus Rabiriana* at Naples in ad Att I 6 § 1. Perhaps the accused was a native of that district.

paniae [vicinitatis] ornetur? cumque ad eius propulsandum periculum non modo homines, sed prope regiones ipsae convenerint, aliquanto etiam latius excitatae quam ipsius vicinitatis nomen ac termini postulabant? nam quid ego ad id longam orationem comparem, quod est in eadem multae irrogatione perscriptum, hunc nec suae nec alienae pudicitiae pepercisse? 9. quin etiam suspicor eo mihi semihoram ab Labieno praestitutam esse, ut ne plura de pudicitia dicerem. ergo ad haec crimina quae patroni

vicinitatis] Kayser follows Beck in bracketing this; and it does seem to have crept in from just below. The MSS have *Campaniae* not *Campanae.*

ornetur] by deputations sent to petition in his favour; a common device, called *laudatio.*

prope regiones ipsae] Cicero is no doubt making the most of some trifling demonstration on Rabirius' behalf. It was very easy to get up these *laudationes.*

ipsius] 'in itself'. That is, it is true they would have supported any neighbour, but not in such force as this. This is due to the merits of Rabirius.

vicinitatis] often concrete thus, like our 'neighbourhood'.

postulabant] required, made it incumbent on them to do. Compare § 29.

multae irrogatione] See Introd C (*m*), E (*f*), appendix K.

perscriptum] this is the reading of Manutius adopted by Kayser. It will give the sense of 'drawn out in full', and perhaps contains a rather weak antithesis to the limit of time imposed on Cicero, to which reference is presently made. The MSS seem to have *praescriptum*, which Zumpt retains. If that be right, it must mean 'inserted in the heading or preamble' of the bill. The figurative sense of 'putting in as a pretext' is seen in Caesar bell civ III 32 *ut honesta praescriptione rem turpissimam tegerent.* In the de domo § 83 we have [*poena*] *ea praesertim quae ne in ipsa quidem rogatione praescripta est.* But there the word surely means 'prescribed', 'appointed' (so *praescriptio legis* in de leg agr II § 22), which will not do here. I incline therefore to *perscriptum*; and so Huschke p 515, who sees in it the point that the full statement given by Labienus was unnecessary when every one knew that the matter of Saturninus was the real question at issue.

§ 9. **plura...dicerem**] how Cicero would have enlarged on this very unsavoury topic readers of his second philippic may guess. The remark made in the pro Caelio § 6 is also instructive in this connexion.

diligentiam desiderant intellegis mihi semihoram istam nimium longam fuisse: illam alteram partem de nece Saturnini nimis exiguam atque angustam esse voluisti: quae non oratoris ingenium, sed consulis auxilium implorat et flagitat. 10. nam de perduellionis iudicio, quod a me sublatum esse criminari soles, meum crimen est, non Rabiri. quod utinam, Quirites, ego id aut primus aut solus ex hac re publica sustulissem! utinam hoc, quod ille crimen esse volt, proprium testimonium meae laudis esset! quid enim optari potest quod ego mallem quam me in consulatu meo carnuficem de foro,

illam alteram] Huschke pp 529—30 would read *ad illam* etc, thus carrying on *semihoram* to *exiguam* etc.

consulis auxilium] the succour or support that a consul is bound to give—which I take to be the full meaning of these words—is I think that maintenance of the *imperium* in its plenitude of power, acting under the commission of the senate, which follows from the justification of the acts of Marius. So Turnebus had understood it. See on §§ 2, 6. Perhaps he intentionally seeks to make his hearers think of the *auxilium tribunicium*.

§ 10. **a me**] doubtless Cicero had used every effort to prevent the trial of Rabirius taking place at all, especially before duumvirs. Labienus may in his speeches and common talk have put some such colour on the consul's action as he is here represented to have done. See § 17 *depulsum*, and Introd E (*e*) and (*f* ii)[2].

quod.....id] Mr Reid writes to me: 'The *id* has been frequently attacked, but is sound, *quod* being the conjunction 'whereas'. Compare de divin II § 127 *quod quoniam illud negatis*, Acad II § 79 *quod ne id facere posses*, orator § 52 *quod quidem ego...sentiebam, non te id sciscitari*, II in Verrem II § 160 *quod nisi Metellus hoc tam graviter egisset*, ad Att XIII 10 § 1 *quod nisi mihi hoc venisset in mentem*, Plaut capt 754 *quod absque hoc esset*, Ter Phorm 157 *quod utinam ne Phormioni id suadere in mentem venisset*'.

carnuficem etc] of course Cicero knew that Rabirius would in no case have been actually put to death; but he makes the most of this in order to excite compassion for the accused. The *carnufices* were servants of the *triumviri capitales*, and were probably *servi publici*. They were kept to torture slaves or put them to death.

de foro] we know that from very early times executions had taken place in the Forum; see Livy VII 19 § 3, IX 24 § 15, XXII 57 § 3, XXVIII

crucem de campo sustulisse? sed ista laus primum est maiorum nostrorum, Quirites, qui expulsis regibus nullum in libero populo vestigium crudelitatis regiae retinuerunt, deinde multorum virorum fortium, qui vestram libertatem non acerbitate suppliciorum infestam, sed lenitate legum munitam esse voluerunt.

IV. 11. Quam ob rem uter nostrum tandem, Labiene, popularis est? tune, qui civibus Romanis in contione ipsa carnuficem, qui vincla adhiberi putas oportere, qui in campo Martio, comitiis centuriatis, auspicato in loco, crucem ad civium supplicium defigi et constitui iubes, an ego, qui funestari contionem contagione carnuficis veto, qui expiandum forum populi Romani ab illis nefarii sceleris vestigiis esse dico, qui

28 § 3. It is to be noted that both here and in § 11 Cicero speaks of both the Forum and the Campus Martius. This may be an intentional following of the words of the old law quoted in Livy I 26, which run *verberato vel intra pomerium vel extra pomerium.* See on § 15.

crucem] Mr Reid writes; 'Crucifixion, I think, always took place outside the walls. The idea appears to be that the *carnufex* fetches the *perduellis* from the forum to crucify him in the campus Martius, the proper place for a military traitor to die'.

crudelitatis] Cicero lays great stress on this point. See §§ 13, 17. Quintilian V 13 § 20 mentions this line of argument as a rhetorical commonplace, referring to this speech as an illustration.

virorum fortium] such as the authors of the Porcian laws.

infestam] this sense, 'endangered', 'threatened', 'beset', is the primary one, and very common.

§ 11. **popularis**] δημοτικὸς: a true defender of the rights of the people, opposed to the aristocratic champions of the senate. It is a cant expression of the time. See de leg agr II § 15 *consul re non oratione popularis*, and the words put into the mouth of Laelius (§ 95) *contio, quae ex imperitissimis constat, tamen iudicare solet quid intersit inter popularem, id est assentatorem et levem civem, et inter constantem et verum et gravem.*

contione] which would naturally be held in the Forum.

campo Martio] the centuries were originally the army, and as a military assembly met outside the city proper; see Mommsen bk II c 1. This rule had survived.

auspicato in loco] compare pro Mil § 43 *ad illa augusta centuriarum auspicia*, Livy I 36 § 6.

castam contionem, sanctum campum, inviolatum corpus omnium civium Romanorum, integrum ius libertatis defendo servari oportere? 12. popularis vero tribunus plebis, custos defensorque iuris et libertatis! Porcia lex virgas ab omnium civium Romanorum corpore amovit: hic misericors flagella rettulit. Porcia lex libertatem civium lictori eripuit: Labienus, homo popularis, carnufici tradidit. C Gracchus legem tulit, ne de capite civium Romanorum iniussu vestro iudicaretur: hic popularis a duumviris, iniussu vestro, non iudicari de cive Romano, sed indicta caussa civem Romanum capitis condemnari coegit. 13. tu mihi etiam legis Porciae, tu C Gracchi, tu horum libertatis, tu cuiusquam de-

omnium civium Romanorum] so in speaking of the crucifixion of Gavius by Verres (II in Verr v § 170) he says *facinus est vincire civem Romanum, scelus verberare, prope parricidium necare; quid dicam in crucem tollere?* and what follows also well illustrates our present passage.

§ 12. **virgas**] Rich (dict Ant) points out that this word is used of a cane or switch used for the chastisement of schoolboys, and of the staff carried by the lictor in the right hand to clear a way for the magistrate. But that it could be made a severe implement of torture may be gathered from II in Verrem v §§ 140—2. So in Livy epit 57 (of Scipio's restoration of discipline before Numantia) *quem militem extra ordinem deprehendisset, si Romanus esset, vitibus, si extraneus, virgis cecidit.* See appendix E.

flagella] the *flagellum* was (see Rich) a far more cruel implement than the *virga*. It had a number of tails, the wiry thongs of which cut into the victim with fearful keenness. See Hor sat I 2 41, 3 119, epod 4 11.

C Gracchus] for this Sempronian law see appendix F.

duumviris] see Introd B, and E (*c*).

indicta] because before these irregularly appointed Duumvirs Rabirius had not had a fair chance. Turnebus. And the procedure was in any case a summary one, judged by the standard of Cicero's time.

coegit] the force would I imagine be in the illegal appointment of Duumvirs for the purpose of condemning Rabirius: not in any constraint laid on them after appointment. But see Introd C (*n*).

§ 13. **tu horum libertatis**] Kayser brackets these awkward words.

nique hominis popularis mentionem facis, qui non modo suppliciis inusitatis, sed etiam verborum crudelitate inaudita violare libertatem huius populi, temptare mansuetudinem, commutare disciplinam conatus es? namque haec tua, quae te hominem clementem popularemque delectant: I, LICTOR, COLLIGA MANUS, quae non modo huius libertatis mansuetudinisque non sunt, sed ne Romuli quidem aut Numae Pompili: Tarquini, superbissimi atque crudelissimi regis, ista sunt cruciatus carmina: quae tu, homo lenis ac popularis, libentissime commemoras: CAPUT OBNUBITO, ARBORI INFELICI SUS-

Possibly they may have got out of their proper place. *horum* refers to the assembled citizens.

temptare] to 'make trial of' their clemency = to see how much of this bloodthirsty procedure they will stand. So often with *patientiam, prudentiam, scientiam*, etc. See the use in de imp Cn Pomp § 23.

disciplinam] the notions and beliefs in which Romans are brought up = 'traditions'. See § 28, pro Cluent § 76.

I, LICTOR, etc] for this and the following quotation see Livy I 26 quoted at the head of the Introduction.

huius] 'this' freedom, which we see around us, in which we live. This use of the demonstrative is very common in Cicero.

Tarquini] this reference to Tarquin is a mere oratorical flourish, as Prof Clark remarks, Early Roman Law § 12.

carmina] 'strains', meaning the set form of words. See Livy I 26 § 6, 32 § 8, III 64 § 9.

obnubito] the veiling of the head was a solemn preliminary to execution. So in II in Verrem V §§ 156, 157 we have *capitibus involutis*. Indeed it was always the custom to prepare for death thus, in deference to the powers of the world below. So Caesar veiled his head as he fell murdered.

arbori] old ablative, as Klotz remarks. So in Livy I 26 § 6.

infelici] 'barren', hence 'accursed'. Paulus the epitomizer of Festus says that Cato used the words *felix* and *infelix* of trees that bear or do not bear fruit respectively. On this Müller remarks that what is meant is that Cato used the words in an agricultural not a religious sense, as Livy V 24 § 2 and Vergil often. So apparently does Pliny nat hist XXIV § 68. Macrobius sat III 20 §§ 2—3 seems rather to be concerned with the religious sense 'impure', 'unlucky', and to connect impurity with the bearing of black (or dark) fruit. Pliny XVI § 108 says *infelices autem existimantur damnataeque religione quae neque seruntur umquam neque*

PENDITO: quae verba, Quirites, iam pridem in hac re publica non solum tenebris vetustatis, verum etiam luce libertatis oppressa sunt.

V. 14. An vero, si actio ista popularis esset et si ullam partem aequitatis haberet aut iuris, C Gracchus eam reliquisset? scilicet tibi graviorem dolorem patrui tui mors attulit quam C Graccho fratris, et tibi acerbior eius patrui mors est, quem numquam vidisti, quam illi eius fratris, quicum concordissime vixerat, et similis viri tu ulcisceris patrui mortem atque ille persequeretur fratris sui, si ista ratione agere voluisset, et par desiderium sui reliquit apud populum Romanum Labienus iste, patruos vester, quisquis fuit, ac Ti Gracchus reliquerat? an pietas tua maior quam C Gracchi? an animus? an consilium? an opes? an auctoritas? an eloquentia? quae si in illo minima fuissent, tamen prae tuis facultatibus maxima putarentur. 15. cum vero

fructum ferunt, where he seems to combine the two meanings.

suspendito] so Tac Germ 12 *proditores et transfugas arboribus suspendunt.* Klotz.

luce libertatis] the expression is used elsewhere. See II in Verrem v § 160.

§ 14. **actio**] 'procedure', viz the antiquated one of the *duumviri.* See § 17.

reliquisset] have left unnoticed, 'neglected'. Compare de fin I § 18 and Madvig's note.

persequeretur] compare de imp Cn Pomp § 11 *ius legationis verbo violatum illi persecuti sunt: vos legatum omni supplicio interfectum relinquetis?*

vester] from the use of this word here and in §§ 22, 23, Huschke p 525 infers that Labienus had some brother or cousin supporting him in this accusation. The use of *vester=tuus* is not found till long after the time of Cicero.

opes] that is, can you argue that Gracchus only dropped the matter because he did not feel sure of having sufficient support, while you have, and so need not draw back?

fuissent...putarentur] compare philippic VIII § 14 *ergo is tibi civis, si temporibus illis fuisses, non probaretur*, Livy IX 19 § 5 *Persas Indos aliasque si adiunxisset gentes, impedimentum maius quam auxilium traheret.* See Madvig's grammar § 347 b obs 2.

facultatibus] 'resources', means, powers, abilities. Compare ad Att III 10 § 2 *tantis facultatibus ingeni,*

his rebus omnibus C Gracchus omnis vicerit, quantum intervallum tandem inter te atque illum interiectum putas? sed moreretur prius acerbissima morte miliens C Gracchus quam in eius contione carnufex consisteret: quem non modo foro, sed etiam caelo hoc ac spiritu censoriae leges atque urbis domicilio carere voluerunt. hic se popularem dicere audet, me alienum a commodis vestris, cum iste omnis et suppliciorum et verborum

consili, gratiae, tantis praesidiis bonorum omnium.

§ 15. **moreretur ... consisteret**] this use of the imperfect is common. Compare Tusc disp I § 90, pro Cluent § 80, philippic VIII § 14 *num igitur eum, si tum esses, temerarium civem aut crudelem putares?* See Madvig § 347 b obs 2.

prius...quam] see Madvig on de fin IV § 20, from which it will be seen that, whatever mood and tense had preceded, we should have had *consisteret* here;—the mood, because of the notion of resistance or avoidance here implied in *prius quam*;—the tense, because it expresses what would have been Gracchus' feelings when alive had such a proposal been made to him.

eius] the possessive genitive, for the *contio* is regarded as the creature of the magistrate who called it together. So 'a meeting of his' = a meeting he had called together. Compare de leg agr III § 1 *in meam contionem prodeant.* The *ius contionem habendi* was a common but not absolute right of all magistrates, Lange I 687, II 663.

[illegible] leges] we find the ex- [illegible] plied to the [illegible] the contracts made on behalf of the state by the censors as superintendents of public works and revenues. Mommsen (Röm Staatsr I p 313 note 5) points out that it would be their duty to assign dwellings to *servi publici.* The exclusion of the *carnufex* came no doubt from some 'regulation' of the censors.

urbis ... carere] we have seen above (§ 10) that executions used to take place in the Forum. This seems however to have gradually become less usual. The work was more and more done outside the walls: outside the Esquiline gate was a common place. See Tac ann II 32 and Orelli's note. [It was in keeping with this tendency that the censors made *carnufices* live outside the city.] But the old practice was not wholly discontinued. In this very year the leading associates of Catiline were strangled in the *Tullianum.* See Sallust Cat 55. The execution mentioned by Tac ann V 9 seems to have been somewhere near the *arx.*

commodis vestris] the regular expression in Cicero for 'your interests', as de leg agr II § 15 *hoc animo legem sumpsi in manus, ut*

acerbitates non ex memoria vestra ac patrum vestrorum, sed ex annalium monumentis atque ex regum commentariis conquisierit, ego omnibus meis opibus, omnibus consiliis, omnibus dictis atque factis repugnarim et restiterim crudelitati? nisi forte hanc condicionem vobis esse voltis, quam servi, si libertatis spem propositam non haberent, ferre nullo modo possent. 16. misera est ignominia iudiciorum publicorum, misera multatio bonorum, miserum exsilium: sed tamen in

eam cuperem esse aptam vestris commodis etc.

annalium] which of the works passing under this name are here meant I cannot venture to say. But I rather think he means the old chronicles of the early writers and the records of the pontiffs and censors etc in a general sort of way, rather than any one set of records in particular. See pro Mur § 16.

regum commentariis] the ancient kings were supposed to have kept books of notes or minutes of their transactions. If any books existed in Cicero's time bearing this title, they were surely forgeries. Such references to them as we find in Livy I 31 § 8, 60 § 4 have of course no authority whatever. But we see that there as here they are spoken of as being consulted for precedents. See Mommsen, Röm Staatsrecht I p 5 note.

condicionem] here and in §§ 16, 30 we may see how the meaning developes itself: 'terms' = what you have to expect = 'prospect'. See on § 6, and compare II in Verrem V § 157, pro Cluent §§ 129, 150.

§ 16. **ignominia**] here used generally of the 'disgrace' following on criminal trials, as often. For the technical sense see appendix H.

iudiciorum publicorum] that is, trials held under the *quaestiones perpetuae*. This trial of Rabirius on appeal to the people is a *iudicium populi*, a very different thing.

exsilium] 'banishment' in the strict sense was not a penalty. Thus in pro Caecina § 100 he says *exsilium enim non supplicium est sed perfugium portusque supplici; nam qui volunt poenam aliquam subterfugere aut calamitatem, eo solum vertunt, hoc est sedem ac locum mutant. itaque nulla in lege nostra reperietur, ut apud ceteras civitates, maleficium ullum exsilio esse multatum.* See the passage, and Jordan's note. Cicero must therefore here mean 'exile' either (a) voluntary, in order to escape punishment, or (b) after condemnation, when that was followed up by a bill brought before the people *ut aqua et igni damnato interdiceretur*. See appendix C, Introd C (*i*).

omni calamitate retinetur aliquod vestigium libertatis. mors denique si proponitur, in libertate moriamur, carnufex vero et obductio capitis et nomen ipsum crucis absit non modo a corpore civium Romanorum, sed etiam a cogitatione, oculis, auribus. harum enim omnium rerum non solum eventus atque perpessio, sed etiam condicio, exspectatio, mentio ipsa denique indigna cive Romano atque homine libero est. an vero servos nostros horum suppliciorum omnium metu dominorum benignitas vindicta una liberat: nos a verberibus, ab unco, a crucis denique terrore neque res gestae neque acta aetas neque vestri honores vindicabunt? 17. quam ob rem fateor atque etiam, T Labiene, profiteor

retinetur etc] compare pro Sulla § 91.

aliquod] '*some*' trace: that is, a marked trace, a real one, such as one can readily detect. Compare § 19 *aliquid*, § 26 *aliquam deprecationem*, pro Mur § 60 *pro aliquo praeiudicio* = 'as a real previous verdict', § 64 *aliquo rei publicae vinculo*, pro Caecina § 5 *pars aliqua iuris*, and a host of other places.

si proponitur ... moriamur] see Madvig § 348 obs 4, and compare de off III § 87 *si gloriae causa imperium expetendum est, scelus absit.*

eventus] the actual occurrence of these punishments.

exspectatio] that is on the part of any citizen whose eyes behold the horrid sight and suggest to him the reflexion that it may be his own case tomorrow. So Turnebus explains it; and if he be (as I think) right, we shall take *condicio* as parallel to *cogitatione* above, and *mentio* to *auribus*.

cive Romano atque homine libero] the second expression goes further than the first: the *crux* is unworthy of a free man anywhere.

vindicta] for *manumissio per vindictam* see Persius v 73—90, and in particular 75—6 *quibus una Quiritem vertigo facit.* Ramsay Rom ant p 100 will give a sufficient account of the proceeding.

verberibus etc] compare the ghastly lines of Lucretius III 1016—7 *carcer et horribilis de saxo iactu' deorsum, verbera carnifices robur pix lammina taedae.*

unco] philippic I § 5, Mayor on Juvenal X 66.

acta aetas] 'our past life', 'our history'. Besides Rabirius was an old man.

§ 17. **quam ob rem**] after the digression in §§ 11—16 he returns to where he left off after § 10 and begins again with the same conjunction.

fateor ... profiteor] a common

et prae me fero te ex illa crudeli, importuna, non tribunicia actione, sed regia meo consilio virtute auctoritate esse depulsum. qua tu in actione quamquam omnia exempla maiorum, omnis leges, omnem auctoritatem senatus, omnis religiones atque auspiciorum

opposition. Compare pro Caecina § 24 *quid confitetur atque ita libenter confitetur ut non solum fateri sed etiam profiteri videatur?*

regia] the name *rex* was regarded with a deep traditional hatred at Rome. Hence orators freely employed the artifice of imputing to their opponents conduct only fitted for a (tyrant) king. See de leg agr II § 15, pro Sulla §§ 21—7. So we might say 'worthy of the Star Chamber'. Cicero no doubt is having a fling at Labienus for having (like a king, eg Tullus) practically nominated the Duumvirs himself.

consilio] 'judgment', 'tact', 'policy'. Compare pro Sulla § 4 (of Hortensius) *hoc honore auctoritate virtute consilio praeditum*, div in Caecil § 73. On the (presumed) possession of this quality Cicero especially prided himself. See the cap he makes to fit himself in pro Mur § 24.

virtute] = the sum of a man's excellencies moral or intellectual or (as here, I think) both. No English word that I know of is coextensive with it. See its wide use in de imp Cn Pomp §§ 28—36.

auctoritate] personal weight, influence, authority.

esse depulsum] See Introd E (*e*) and (*f* ii)[2].

exempla maiorum] referring to the irregularity in the appointment of the *duumviri*, or perhaps to the employment of that procedure at all. See Introd B.

leges] probably he refers to the Porcian and Sempronian laws mentioned above. But as I have already remarked (§ 10) Cicero very well knew that Rabirius would not have been scourged and put to death.

auctoritatem senatus] I think this bears only the general meaning of the 'authority' of the senate, that is, the sanction they had given to the killing of Saturninus by declaring him a public enemy. See on *auctoritas senatus* § 2. So in Pisonem § 4 (referring to this very case) he says *senatus auctoritatem*. But he may be speaking of their opposition to Labienus' measures.

religiones etc] probably Labienus had disregarded some flaw in the auspices taken before the assembly of the centuries, or the notice of a magistrate (such as Q Metellus Celer the augur who was praetor this year) that he intended to watch the heavens for signs of the divine will (*de caelo servare*). See philippic II §§ 80—1 and Mayor's notes. Or it may refer to Labienus' carrying his *rogatio* in the tribes for a trial (Introd E *e*) in the teeth of all such obstacles,

publica iura neglexisti, tamen a me haec in hoc tam exiguo meo tempore non audies. liberum tempus nobis dabitur ad istam disceptationem.

VI. 18. Nunc de Saturnini crimine ac de clarissimi patrui tui morte dicemus. arguis occisum esse a C Rabirio L Saturninum, *at* id C Rabirius multorum testimoniis, Q Hortensio copiosissime defendente, antea falsum esse docuit. ego autem, si mihi esset integrum, susciperem hoc crimen, agnoscerem, confiterer. utinam hanc mihi facultatem causa concederet, ut possem hoc praedicare, C Rabiri manu L Saturninum, hostem

perhaps disregarding the *lex Aelia et Fufia* (see Halm on pro Sestio § 33), Huschke p 522.

publica] this word is somewhat unmeaning here, and is omitted by some MSS. Kayser therefore brackets it. If it have any sense, it must be 'concerning the state', 'constitutional'. Compare de orat I § 201 *publica quoque iura, quae sunt propria civitatis atque imperi.*

dabitur] this may be a threat, of course not meant to be carried out, of finding an excuse for bringing Labienus to trial some day. But see Introd E (*f* ii)[5].

ad istam disceptationem] 'for discussing those points'. Compare pro Mil § 23 *et lator ipse legis, quum esset controversia nulla facti, iuris tamen disceptationem esse voluit*, pro Cluent §§ 79, 81, 88, 90.

§ 18. **crimine**] though I think that the sense 'the charge relating to Saturninus' is possible, still it is a very awkward expression. Kayser brackets *crimine*. Huschke p 517 takes it as opposed to *meum crimen* of § 10. If it be kept, I can only compare such expressions as pro Sestio § 72 *inimicitias sibi mecum ex rei publicae dissensione susceptas.*

at id] so Turnebus for *et id.* Kayser accepts it, and I am unable to find a really parallel instance to support the *et.*

Q Hortensio] he had no doubt spoken for Rabirius before the *duumviri*, but this probably refers to a speech before the people. Cicero spoke last.

ego autem etc] for this line of speaking compare pro Mil §§ 72—83, philippic II §§ 25—36. See below § 31, de orat II § 106.

integrum] untouched, in which nothing has yet been done, where all is still open. Very common. See pro Mur §§ 8, 43. We have it again in next section.

agnoscerem] compare pro Mil § 38 *cum totius Italiae concursus ... facti illius gloriam libens agnovisset.*

confiterer] 'admit', 'plead guilty'. See on § 17 *fateor*, and particularly compare pro Mil §§ 81, 82.

populi Romani, interfectum! nihil me clamor iste commovet, sed consolatur, cum indicat esse quosdam civis imperitos, sed non multos. numquam, mihi credite, populus Romanus hic qui silet consulem me fecisset, si vestro clamore perturbatum iri arbitraretur. quanto iam levior est adclamatio! quin continetis vocem, indicem stultitiae vestrae, testem paucitatis. 19. libenter, inquam, confiterer, si vere possem aut etiam si mihi esset integrum, C Rabiri manu L Saturninum esse occisum, et id facinus pulcherrimum esse arbitrarer, sed, quoniam id facere non possum, confitebor id, quod ad laudem minus valebit, ad crimen non minus: confiteor interficiendi Saturnini causa C Rabirium arma cepisse. quid est, Labiene? quam a me

commovet] 'makes nervous'. See div in Caecil § 41.

cum indicat] see div in Caecil § 54, Madvig § 358 obs 2. 'Betraying as it does'.

imperitos] foolish, that is, so ignorant of the constitutional bearings of the question as not to know that Saturninus was rightly slain with the sanction of the senate. Compare Laelius § 95 *contio, quae ex imperitissimis constat*. The word is a general one, changing its local meaning according to the special context, very like the Greek ἰδιώτης. See § 24.

hic qui silet] said with a wave of the hand towards some of the nearer bystanders—very likely posted there by Cicero himself.

fecisset si arbitraretur] see II in Verrem II § 3, Madvig § 347 b obs 2.

perturbatum] 'put out', 'disconcerted'.

iam] 'at once'.

quin continetis etc] the first two words were probably uttered in a very harsh bitter voice, according to Quintilian XI 3 § 169 who quotes the passage loosely from memory.

indicem] used more in the strict sense than *indicat* above, as the opposition to *testis* shews. 'Anyone can see how few you are, and you yourselves bear witness of it besides; but you go further and betray your own folly, which we might otherwise not have discovered'. See div in Caecil § 34 *indicium*.

§ 19. **confiterer** etc] this passage, if not wholly a fresh insertion, was surely much heightened in colour when the speech was edited for publication.

ad laudem...valebit] compare pro Mur §§ 59, 67.

graviorem confessionem aut quod in hunc maius crimen exspectas? nisi vero interesse aliquid putas inter eum, qui hominem occidit, et eum, qui cum telo occidendi hominis caussa fuit. si interfici Saturninum nefas fuit, arma sumpta esse contra Saturninum sine scelere non possunt: si arma iure sumpta concedis, inter*fectum iure concedas necesse est.*

In vetustissimo exemplari deest una charta.

VII. 20. Fit senatus consultum, ut C Marius L

cum telo ... fuit] a regular expression in this connexion. Compare pro Mur § 52, pro Mil § 11, Sallust Cat 27 § 2.

occidendi hominis caussa] that is, the intent, not the deed, constitutes the crime. See pro Mil §§ 7, 8, 11, 19, and compare Julius Paullus v 23 § 3 *qui hominem occiderit aliquando absolvitur, et qui non occidit ut homicida damnatur; consilium enim uniuscuiusque, non factum, puniendum est. ideoque qui, cum vellet occidere, id casu aliquo perpetrare non potuit ut homicida punitur: et is qui casu iactu teli hominem imprudenter occiderit absolvitur.*

interfectum etc] the italics in the text denote the necessary supplement of Manutius, now regularly adopted. Here follows a considerable lacuna in the MSS. See Introd F. The words *in vetustissimo* etc are found in some MSS.

§ 20. **fit sctum, ut** etc] the ordinary form of this decree was (see appendix A) *dent operam* (or *videant*) *consules ne quid res publica detrimenti capiat.* I can find no statement in the surviving accounts of this affair of Saturninus that gives the very words used on the occasion. But I have a strong suspicion that Cicero is only using this other (itself, as will be seen below, probably in its own place formal) language in order to drag in the word *maiestas.* For if we remember that charges of *perduellio* had for some time been very rare, since that crime was being more and more absorbed by that of (*laesa* or *imminuta*) *maiestas*, there would really be some moral gain in shewing that Rabirius had acted on the side *conservandae maiestatis.* And at present I know of no other passage where this form of words is used in this connexion: nor does Lange cite any other. It is however just possible that the senate may have chosen the expression at the time with a view to the lawless acts of the author of the Appuleian law.

[Since writing the above I find that in the work *de viris illustribus urbis Romae* attributed (wrongly, see Teuffel Gesch der Röm Lit § 414) to Aurelius Victor, a writer of the fourth century A D, cap 73

Valerius consules adhiberent tribunos plebis et praetores quos eis videretur operamque darent, ut imperium populi Romani maiestasque conservaretur. adhibent omnis tribunos plebis praeter Saturninum, *praetores omnis* praeter Glauciam: qui rem publicam salvam esse vellent, arma capere et se sequi iubent. parent omnes. ex aedificiis armamentariisque publicis arma

§ 10, stand the following words; *Marius senatus consulto armatus quo censeretur, darent operam consules ne quid res publica detrimenti caperet, Saturninum et Glauciam in Capitolium persecutus obsedit.* I do not wish to lay very great stress on the words, but such value as they have tells on the side of my conjecture hazarded above.]

adhiberent etc] Zumpt Criminalrecht I 2 pp 402—3 thinks that this clause concerning the calling in other magistrates was added in most if not all cases of this *sctum* being issued. I see no proof of this, and he gives none.

maiestas] this word, used also in §§ 2, 35, signifies in a general sense the 'sovereign majesty' or 'sovereignty' of the Roman people. Since the *lex Appuleia* of Saturninus any conduct calculated to injure this had been made criminal, and definitions of *maiestas* and of the kinds of acts that could be held to weaken it had naturally been sought for. Hence the numerous references thereto in the rhetorical works of Cicero. See de invent II §§ 52—5, de orat II § 164, partit orat §§ 104—5, and also Quintil VII 3 § 35. In philippic III § 13 *auctoritatem huius ordinis maiestatemque populi Romani* we have (as Rein remarks) a distinction not always observed. It is worthy of note that it was customary in treaties imposed by Rome on other peoples to add *maiestatem populi Romani comiter conservanto*; see pro Balbo §§ 35—7 and Reid's notes, comparing Livy XXXVIII 11 § 2. See also div in Caecil § 69. It is the highest term for greatness and imperial dignity (connected with *maios, maior*), well illustrated by the case of the soldiers who (Caesar bell Gall VII 17) amid fearful hardships would not utter a sound unworthy of the *maiestas* of the Roman people. See Introd C (*p*).

praeter Saturninum] he should have added Gracchus (Equitius). See below.

praeter Glauciam] C Servilius Glaucia the well-known demagogue was an ally of Saturninus.

qui...vellent] this seems to have been the regular set form of words used in such an appeal to the 'party of order', though the need for its use seldom arose. See § 34, post reditum in senatu §§ 24—5, and the note on *qui in salute* etc below.

ex aedificiis etc] MrLong (Decline of Roman Republic I 117) remarks

populo Romano, C Mario consule distribuente, dantur. hic iam, ut omittam cetera, de te ipso, Labiene, quaero: cum Saturninus Capitolium teneret armatus, esset una C Glaucia, C Saufeius, etiam ille ex compedibus atque ergastulo Gracchus: addam, quoniam ita vis, eodem Q Labienum, patruom tuum: in foro autem C Marius et L Valerius Flaccus consules, post cunctus senatus atque ille senatus, quem *iam ne vos ipsi quidem* [qui hos patres conscriptos, qui nunc sunt,] in invidiam vocatis, quo facilius de hoc senatu detrahere possitis: cum equester ordo—at quorum equitum [Romanorum], di

'it appears from what happened on this and other occasions of arming the people that they did not possess arms at home, and very probably were not allowed to keep them'. See Livy III 15 §§ 7, 8.

Saufeius] an obscure associate of Saturninus. Appian says that he was a quaestor.

ille...Gracchus] this was a fellow named L Equitius, said to have been a runaway slave, who came forward at that time of disturbance as a candidate for the tribuneship, giving out that he was a son of Tiberius Gracchus. The populace received him with marked favour and elected him tribune. The appearance and success of this worthless pretender was a notable indication of the utter disorganization of Roman society and the breakdown of the old constitution. He perished with the rest of the associates of Saturninus. For the facts concerning him see pro Sestio § 101, Appian bell civ I 32—3, Florus III 16 § 1, Valer Max IX 7 § 1, 15 § 1, III 2 § 18, 8 § 6, [Aurel Victor] de viris illustr 73 §§ 3, 4.

quoniam ita vis] he means that nobody would have known or remembered the fact of the man's presence had not Labienus brought it forward, as Turnebus well pointed out.

cunctus] hear Paulus the epitomizer of Festus (p 50); *cuncti significat quidem omnes, sed coniuncti et congregati, at vero omnes etiam si diversis locis sint.*

qui hos patres etc] in bracketing these and other words in this section I have simply adopted the somewhat violent expedients of Kayser (chiefly following Bake), in order to get some tolerable sense out of the passage. But I doubt whether a satisfactory restoration is possible. Klotz keeps the words in brackets and *quem etiam vos ipsi* (not *iam ne vos ipsi quidem*), inserts *laudatis* after *vocatis*, and reads *quae* referring to *aetatis* (not *qui* referring to *ordo*).

at quorum etc] so he breaks off in pro Sulla § 4 *at quos viros! non solum summa virtute et fide*, etc.

immortales!—[patrum nostrorum atque eius aetatis,] *qui* tum magnam partem rei publicae atque omnem dignitatem iudiciorum tenebat: cum omnes omnium ordinum homines, qui in salute rei publicae salutem suam repositam esse arbitrabantur, arma cepissent, quid tandem C Rabirio faciendum fuit? 21. de te ipso, inquam, Labiene, quaero: cum ad arma consules ex senatus consulto vocavissent, cum armatus M Aemilius, princeps senatus, in comitio constitisset, qui cum ingredi vix posset, non ad insequendum sibi tarditatem pedum, sed ad fugiendum impedimento fore putabat: cum denique Q Scaevola, confectus senectute,

qui tum ... tenebat] they held the state contracts for the revenues etc (*publica*) and also, since the law of Gaius Gracchus, the exclusive right of sitting on juries in criminal trials (*iudicia*). Of this latter the legislation of Sulla deprived them. Or *magnam partem reip* may simply mean that they formed a very important political party.

qui in salute etc] compare his words (referring to the Catilinarian conspiracy) pro Sulla § 32 *ecquem tu horum qui adsunt.....aut tam sceleratum statuis fuisse, ut haec omnia perire voluerit, aut tam miserum, ut et se perire cuperet et nihil haberet quod salvum esse vellet?*

§ 21. **M Aemilius**] *Scaurus*, the well-known chief of the senatorial party for many years, of whom Cicero's works contain so many laudatory notices. His character is mercilessly analysed and exposed by Mommsen bk IV c 4 *passim*. One passage of his life is of interest here. Saturninus when quaestor had received the *provincia Ostiensis* (see pro Mur § 18), and had somehow displeased the senate or misconducted himself in that charge. The senate went so far as to remove him from his office and appoint Scaurus in his place. This is said to have driven Saturninus into the arms of the extreme democrats (*factum esse popularem*). See pro Sestio § 39, de harusp resp § 43. The reference to his conduct here is more fully worked up by Valerius Max III 2 § 18.

ingredi] 'put foot to ground', 'walk'. Compare Tusc disp I § 75 *qui in compedibus corporis semper fuerunt, etiam cum soluti sunt, tardius ingrediuntur.*

Q Scaevola] this must be Q Mucius Scaevola generally called the Augur to distinguish him from his relative the *pontifex maximus*. He was a very famous jurist, and so too was the pontiff. He lived till BC 88.

perditus morbo, mancus et membris omnibus captus ac debilis, hastili nixus, et animi vim et infirmitatem corporis ostenderet: cum L Metellus, Ser Galba, C Serranus, P Rutilius, C Fimbria, Q Catulus omnesque, qui tum erant, consulares pro salute communi arma cepissent: cum omnes praetores, cuncta nobilitas ac iuventus accurreret, Cn et L Domitii, L Crassus, Q Mucius, C Claudius, M Drusus: cum omnes Octavii, Metelli, Iulii, Cassii, Catones, Pompeii: cum L Philippus, L Scipio, cum M Lepidus, D Brutus, cum hic ipse P Servilius, quo tu imperatore, Labiene, meruisti: cum hic Q Catulus, admodum tum adulescens, cum hic C Curio, cum denique omnes clarissimi viri cum consulibus essent, quid tandem C Rabirium facere convenit? utrum inclusum atque abditum latere in occulto atque ignaviam suam tenebrarum ac parietum custodiis tegere an in Capitolium pergere atque ibi se cum tuo patruo et ceteris ad mortem propter vitae turpitudinem con-

He is one of the speakers in the dialogue *Laelius*. See Reid's introduction p 15.

debilis] I have explained the force of this word on pro Mur § 79.

L Metellus] brother of Q Caecilius Metellus Numidicus whom Saturninus had driven into exile. See Mommsen bk IV c 6.

P Rutilius] Rufus, the army reformer, a most worthy and incorruptible man. For his shameless condemnation on a charge of *repetundae* by the equestrian *iudices* (about 92 B C) see Mommsen bk IV c 6.

Q Catulus] the colleague of Marius and conqueror of the Cimbri in B C 101. See Mommsen bk IV c 5.

nobilitas ac iuventus] a hendiadys, I think. 'The nobles of military age'.

P Servilius] *Vatia Isauricus*. For his campaigns against the corsairs and mountain tribes of southern Asia Minor in B C 78—6 see Mommsen bk V c 2.

Q Catulus] this Lutatius Catulus was son of the above, and was himself a general of some distinction. He was consul in B C 78.

C Curio] Gaius Scribonius Curio, father of the man who afterwards did so much for the cause of Caesar, was consul B C 76. For his campaigns in Thrace and Macedonia B C 75—3 see Mommsen bk V c 2.

fugientibus congregare? an cum Mario, Scauro, Catulo, Metello, Scaevola, cum bonis denique omnibus coire non modo salutis, verum etiam periculi societatem?

VIII. 22. Tu denique, Labiene, quid faceres tali in re ac tempore? cum ignaviae ratio te in fugam atque in latebras impelleret, improbitas et furor L Saturnini in Capitolium arcesseret, consules ad patriae salutem ac libertatem vocarent, quam tandem auctoritatem, quam vocem, cuius sectam sequi, cuius imperio parere potissimum velles? patruos, inquit, meus cum Saturnino fuit. quid, pater quicum? quid, propinqui vestri, equites Romani? quid, omnis praefectura, regio, vicinitas vestra? quid, ager Picenus universus utrum tribunicium furorem an consularem auctoritatem secutus

coire...societatem] compare de deorum natura II § 123 *pina vero ...cum parva squilla quasi societatem coit comparandi cibi*, and see Mayor on philippic II § 24 *utinam, Pompei, cum Caesare societatem aut numquam coisses aut numquam diremisses.*

§ 22. **ignaviae ratio**] see on § 2 *ratio humanitatis.*

ad salutem] 'to uphold' the welfare of your country. For *ad* see pro Mur §§ 53, 59.

pater] of this man nothing seems to be known.

praefectura] Festus p 233 *praefecturae eae appellabantur in Italia in quibus et ius dicebatur et nundinae agebantur et erat quaedam earum res publica neque tamen magistratus suos habebant; in quas legibus praefecti mittebantur quotannis qui ius dicerent.* He goes on to distinguish two classes and name instances. Among the names is Reate, to which Turnebus—why, I know not,—thinks that the family of Labienus belonged. The legal status of the *praefecturae* varied greatly in the various cases. See Madvig, Verfassung und Verwaltung I pp 44, 49, II pp 4, 5.

ager Picenus] this district had been parcelled out to Roman settlers before the Hannibalic war by a law of Gaius Flaminius who made the road named after him. See Brutus § 57. It is to be noted that Valer Max IX 15 § 1 says that Equitius came from Firmum in Picenum.

furorem etc] common language in Cicero's mouth about this time and for most of the rest of his life. See de leg agr II § 14, pro Mur § 24, etc.

secutus est] we know that the consular elections for 99 BC gave occasion to the great riot and the death of Saturninus. Probably

est? 23. equidem hoc adfirmo, quod tu nunc de tuo patruo praedicas, neminem umquam adhuc de se esse confessum: nemo est, inquam, inventus tam profligatus, tam perditus, tam ab omni non modo honestate sed etiam simulatione honestatis relictus qui se in Capitolio fuisse cum Saturnino fateretur. at fuit vester patruos. fuerit, et fuerit nulla desperatione rerum suarum, nullis domesticis volneribus coactus: induxerit eum L Saturnini familiaritas, ut amicitiam patriae praeponeret: idcircone oportuit C Rabirium desciscere a re publica? non comparere in illa armata multitudine bonorum? consulum voci atque imperio non oboedire? 24. atqui videmus haec in rerum natura tria fuisse, ut aut cum Saturnino esset aut cum bonis aut lateret. latere mortis erat instar turpissimae, cum Saturnino esse furoris et sceleris, virtus et honestas et pudor cum consulibus esse cogebat. hoc tu igitur in crimen vocas, quod cum eis fuerit C Rabirius, quos amentissimus fuisset si oppugnasset, turpissimus si reliquisset? IX. at C Decianus, de quo tu saepe commemoras, quia,

then a few voters from the towns of Picenum were present in Rome at the time, led there by various motives. They may have taken part with the 'party of order',—at least they were pretty certain to say so afterwards, as Cicero naively goes on to admit.

§ 23. **honestate**] 'right and virtuous feeling', that prompts to right action. It seems to be = *virtus* viewed as a feeling that influences our public conduct. See § 24, de off I §§ 4, 17, and pro Archia § 14 *nihil esse in vita magno opere expetendum nisi laudem atque honestatem* with Reid's note.

relictus] with *ab*. So Tusc disp V § 14 *se* (the virtues) *a beata vita esse relictas*.

fuerit] Madvig § 352.

induxerit] for the word compare pro Mur § 62 *inductus*.

C Rabirium] emphatic, to shew that he was a man 'with a stake in the country', not a necessitous desperado.

§ 24. **haec...fuisse...ut**] see div in Caecil § 22 *id est ut*, Madvig § 374.

instar] de off § 69 *patrocinio vero se usos aut clientes appellari mortis instar putant*.

C Decianus] was a member of

cum hominem omnibus insignem notis turpitudinis, P Furium, accusaret summo studio bonorum omnium, queri est ausus in contione de morte Saturnini, condemnatus est. etiam Sex Titius, quod habuit imaginem L Saturnini domi suae, condemnatus est. statuerunt equites Romani illo iudicio improbum civem esse et non retinendum in civitate, qui hominis hostilem in modum seditiosi imagine aut mortem eius honestaret aut desideria imperitorum misericordia commoveret aut suam significaret imitandae improbitatis voluntatem. 25. itaque mihi mirum videtur unde hanc tu, Labiene, imaginem, quam tu habes, inveneris. nam Sex Titio damnato qui istam habere auderet inventus est nemo. quod tu si audisses aut si per aetatem scire potuisses, numquam profecto istam imaginem, quae domi posita

the *gens Appuleia*. Little is known of him beyond the present story, which is very likely a gross misrepresentation. He seems to have been endeavouring to take vengeance for Saturninus. Valer Max VIII I damn § 2 dresses up the story further, saying that the very penalty meant for Furius was inflicted on him instead. He calls him *spectatae integritatis vir*, and perhaps this may explain why Labienus had often referred to him as an authority: Turnebus also suggests this. The Schol Bob (p 230 Orelli) on the pro Flacco says that after this condemnation he went to the East and joined king Mithridates. For the general political bearing of these cases see Mommsen bk IV c 6.

P Furium] *Philum* (?), of whom little seems to be known. Valerius Maximus seems to imply that he got off. But, if he be the man spoken of by Dion Cassius frag 95, it would appear that he was lynched by the people when impeached before them for his acts as tribune; and also that he had basely deserted Saturninus and Glaucia and joined in the attack on them.

Sex Titius] a man of indifferent character who as tribune in B C 99 carried an agrarian law, which was annulled on a religious pretext. See de orat II § 48, 265, Brutus § 225, Valer Max VIII I damn § 3, Mommsen bk IV c 6.

§ 25. **imaginem**] Quintil VI I § 49 praises the skill shewn by Cicero in this endeavour to neutralize the effect of the exhibition of the cast of Saturninus' face on the populace.

pestem atque exsilium Sex Titio attuli*t*, in rostra atque in contionem attulisses nec tuas umquam ratis ad eos scopulos appulisses, ad quos Sex Titi adflictam navem et in quibus C Deciani naufragium fortunarum videres. sed in his rebus omnibus imprudentia laberis. caussam enim suscepisti antiquiorem memoria tua. quae caussa ante mortua est quam tu natus esses, qua in caussa tute profecto fuisses, si per aetatem esse potuisses, eam *cum* in iudicium vocas, 26. [an] non intelligis primum quos homines et quales viros mortuos summi sceleris arguas? deinde quot ex eis, qui vivont, eodem crimine in summum periculum capitis arcessas? nam si C Rabirius fraudem capitalem admisit, quod arma contra L Saturninum tulit, huic quidem adferet aliquam deprecationem periculi aetas: illa, qua tum fuit, Q vero Catulum, patrem

attulit] emended by Baiter. *attulisset* might mean 'it having (as you must have known) brought'. But so forced an interpretation is not needed with *attulisses* so near to account for a corruption.

rostra...contionem] this must refer to some occasion on which Labienus harangued a meeting in the Forum. See Introd E (*f* ii)[4].

ratis] an emendation of MSS *rationes* adopted by Kayser.

scopulos] Cicero, who is fond of such metaphors, remarks in de orat II § 163 *deinde videndum ne longe simile sit ductum: Syrtim patrimoni, scopulum libentius dixerim; Charybdim bonorum, voraginem potius.* Compare pro Sulla § 41.

imprudentia laberis] a favourite expression of Cicero's. See pro Mur § 78. *labi* = to go wrong, σφάλλεσθαι. Compare de orat I § 202 *languentem labentemque populum*, Caesar bell Gall V 3, Herod VII 50.

caussam] 'cause', 'side'. So pro Sulla § 9 *una bonorum est omnium caussa*, de imp Cn Pomp § 53 *ipsius populi Romani salus et vera caussa.*

esses] see Madvig § 360. Halm, Baiter, Kayser would read *es.*

eam cum] so Rau, followed by Kayser, for *eam caussam. cum* had probably been mistaken for an abbreviation of *caussam*, and hence *an* added below, thus really spoiling the argument.

§ 26. **fraudem**] compare de orat II § 199 *id C Norbano in fraude capitali esse ponendum*, Liv XXIII 14 § 3. Surely *fraus* = 'guilt', not as Ulpian in digest XXI tit i 23 § 2 (cited by Klotz) explains it = *poena.* See Digest L 16 § 131.

huius, in quo summa sapientia, eximia virtus, singularis humanitas fuit, M Scaurum, illa gravitate, illo consilio, illa prudentia, duos Mucios, L Crassum, M Antonium, qui tum extra urbem cum praesidio fuit, quorum in hac civitate longe maxima consilia atque ingenia fuerunt, ceteros pari dignitate praeditos custodes gubernatoresque rei publicae quem ad modum mortuos defendemus? 27. quid de illis honestissimis viris atque optimis civibus, equitibus Romanis, dicemus, qui tum una cum senatu salutem rei publicae defenderunt? quid de tribunis aerariis ceterorumque ordinum omnium hominibus, qui tum arma pro communi libertate ceperunt? X. sed quid ego de eis omnibus, qui consulari imperio

L Crassum, M Antonium] two of the greatest orators of Rome, of whom Cicero is constantly speaking. He could remember them in his youth; and his treatise *de oratore* is practically an embodiment of their views on the subject of oratory intended to preserve the fame of these great men, who had left so little behind in the way of literary remains.

qui...fuit] 'M Antonius, consul designatus, was posted outside the city with an armed force, probably to prevent the country folks from coming to help their friend the tribune'. G Long.

ingenia] a word very frequently employed by Cicero in speaking of orators.

§ 27. **equitibus**] for the way in which the violent measures of Saturninus led to a temporary combination of the senate and *equites*, see Mommsen bk IV c 6.

tribunis aerariis] see appendix G.

ceterorum ordinum] this probably refers to all those lesser citizens who having some little capital of their own (and so something to lose) had embarked it in various companies of a less ambitious character than those of the *publicani*. See II in Verrem II § 17 *si cuiquam ordini sive aratorum sive pecuariorum sive mercatorum probatus sit*. In an inscription of the time of Elagabalus (Wilmanns 1737) I find *ex decreto ordinis corporis piscatorum et urinatorum totius alv(ei) Tiber(ini) quibus ex s(enatus) c(onsulto) coire licet*. So we have the word used of priestly bodies, ordo *sacerdotum*, *haruspicum*, *Augustalium*, etc. So too *ordo scribarum* (pro Mur § 42, II in Verr III § 183), *fabrorum tignariorum* (Wilmanns 1742) and others. Valer Max V 2 § 1 has even *matronarum ordinem*. Compare generally de imp Cn Pomp §§ 17, 18, in Catil IV §§ 14—16.

paruerunt, loquor? de ipsorum consulum fama quid futurum est? L Flaccum, hominem cum semper in re publica tum in magistratibus gerendis, in sacerdotio caerimoniisque quibus praeerat diligentissimum, nefarii sceleris ac parricidi mortuom condemnabimus? adiungemus ad hanc labem ignominiamque mortis etiam C Mari nomen? C Marium, quem vere patrem patriae, parentem, inquam, vestrae libertatis atque huiusce rei publicae possumus dicere, sceleris ac parricidii nefarii mortuom condemnabimus? 28. etenim si C Rabirio, quod iit ad arma, crucem T Labienus in campo Martio defigendam putavit, quod tandem excogitabitur in eum supplicium, qui vocavit? ac si fides Saturnino data est, quod abs te saepissime dicitur, non eam C Rabirius,

de...fama quid futurum est] compare Terence adelphoe 996 *sed de fratre quid fiet?*

L Flaccum] the colleague of Marius in the consulship B C 100. See § 20.

in re publica] 'in his political career'.

sacerdotio] from de divinat I § 104 we learn that he had been *flamen Martialis.*

parricidi] for the meaning of this word see Clark, Early Roman Law § 7. I do not however believe that *parricida* is a shortened form of *parenticida.* For the figurative use see in Vatin § 35, Sall Cat 51 § 25.

labem ignominiamque] he is fond of this connexion. See I in Verrem § 40, de imp Cn Pomp § 33.

§ 28. **iit ad arma**] so ad fam VIII 15 § 2 *civitas ad arma iit,* philippic XIV §§ 1—3 *ad saga.* Whether the form *iit* should be read in Cicero is doubtful.

fides...data est] that this assurance was really given at the time there seems to be no doubt. Thus Plutarch Mar 30 *παρέδωκαν σφᾶς αὐτοὺς διὰ τῆς λεγομένης δημοσίας πίστεως,* [Aurel Vict] de viris ill 73 § 10 (Marius) *in deditionem accepit: nec deditis fides servata.* This seems implied also in the words of Florus III 16 § 6 (Saturninus) *senatuique per legatos paenitentiae fidem faceret,* nor does Appian bell civ I 32 make against it, though he only says *ἐλπίσαντες αὐτοῖς ἐπικουρήσειν Μάριον παρέδωκαν ἑαυτούς.* Orosius V 17 § 9 simply says that they took refuge in the *curia, cogente Mario.* The same pledge was given to the informers in the matter of the Catilinarian conspiracy. See in Catil III § 8 *fidem publicam iussu senatus dedi,* and Sallust Cat 47 § 1, 48 § 4.

sed C Marius dedit, idemque violavit, si in fide non stetit. quae fides, Labiene, qui potuit sine senatus consulto dari? adeone hospes es huiusce urbis, adeone ignarus disciplinae consuetudinisque nostrae, ut haec nescias, ut peregrinari in aliena civitate, non in tua magistratum gerere videare? 29. quid iam ista C Mario, inquit, nocere possunt, quoniam sensu et vita caret? itane vero? tantis in laboribus C Marius periculisque vixisset, si nihil longius quam vitae termini postulabant, spe atque animo de se et gloria sua cogitasset? at credo, cum innumerabilis hostium copias in Italia fudisset atque obsidione rem publicam liberasset, omnia sua secum una moritura arbitrabatur. non est ita, Quirites: neque quisquam nostrum in rei

sine senatus consulto] see last note. This is a very poor piece of argument, for there can be no doubt that (as Hotomann long ago remarked) no further authorization was needed, all such powers being included in the *sctum ultimum*, if that were valid.

hospes...peregrinari] this tone seems to have been often taken by Roman speakers. From pro Sulla §§ 22—5, Sallust Cat 31 § 7, we see that Cicero had been himself twitted with being a denizen rather than a citizen. With the present passage compare de orat I § 249 *cur ergo non eidem in iure civili.....satis instructi esse possumus ad hoc dumtaxat, ne in nostra patria peregrini atque advenae esse videamur?* Acad I § 9, ad Att IV 13 § 2, VI 3. § 4.

§ 29. **quid iam**...etc] compare the words put into the mouth of Caesar (then *pontifex maximus*) by Sallust Cat 51 § 20 *de poena possumus equidem dicere, id quod res habet, in luctu atque miseriis mortem aerumnarum requiem non cruciatum esse, eam cuncta mortalium mala dissolvere, ultra neque curae neque gaudio locum esse.* Such was the Epicurean view, for which see Lucretius III *passim*. See also pro Cluent §§ 10, 171.

tantis in laboribus etc] Cicero is fond of taking this line; it seems to have been one of his regular commonplaces. See pro Archia §§ 28—30, pro Sestio § 47, Tusc disp I §§ 32—5.

in Italia] referring to the defeat of the Cimbri near Vercellae in BC 101.

obsidione] the word is used because the inroad of the Cimbri had been really equivalent to a *tumultus Gallicus*, which was traditionally held to create a state of siege. See philippic VIII §§ 2—4.

publicae periculis cum laude ac virtute versatur quin spe posteritatis fructuque ducatur. itaque cum multis aliis de caussis virorum bonorum mentes divinae mihi atque aeternae videntur esse, tum maxime, quod optimi et sapientissimi cuiusque animus ita praesentit in posterum, ut nihil nisi sempiternum spectare videatur. 30. quapropter equidem et C Mari et ceterorum virorum sapientissimorum ac fortissimorum civium mentes, quae mihi videntur ex hominum vita ad deorum religionem et sanctimoniam demigrasse, testor me pro illorum fama gloria memoria non secus ac pro patriis fanis atque delubris propugnandum putare, ac si pro illorum laude mihi arma capienda essent, non minus strenue caperem, quam illi pro communi salute ceperunt. etenim, Quirites, exiguom nobis vitae curriculum natura circumscripsit, immensum gloriae. XI. qua re si eos, qui iam de vita decesserunt, ornabimus, iustiorem nobis mortis condicionem relinquemus. sed si illos, Labiene, quos iam videre non possumus, neglegis, ne his quidem, quos vides, consuli putas oportere? 31. neminem esse

laude] 'merit', as often.

spe posteritatis fructuque] 'hope of reward from posterity', a hendiadys. For the genitive ('hope *in*') compare de imp Cn Pomp § 44 *unius hominis spe ac nomine* = hope in one man directly his name was mentioned.

virorum bonorum] this limited view of immortality is apparently derived from the Stoics. They held that only the souls of the good and wise will last till the end of the world in the general conflagration. Those of the bad and foolish only last a short time after death, and meantime are punished in the nether world. So Tacitus (Agr 46) thinks that *piorum manes* and *magnae animae* will survive in a sort of Elysium. See Zeller's 'Stoics Epicureans and Sceptics' pp 204—9 (Eng trans), J B Mayor, Sketch of ancient Philosophy p 155.

sempiternum] compare de re publ VI §§ 13, 25.

§ 30. **religionem**] sanctity, as in II in Verrem IV §§ 96, 109, 127, etc.

iustiorem] more favourable, like (Ter Andr 36) *iusta et clemens servitus*.

condicionem] see on § 15.

dico ex his omnibus, qui illo die Romae fuerit, quem tu diem in iudicium vocas, pubesque tum fuerit, quin arma ceperit, quin consules secutus sit. omnes ei, quorum tu ex aetate coniecturam facere potes quid tum fecerint, abs te rei capitis C Rabiri nomine citantur. at occidit Saturninum Rabirius. utinam fecisset! non supplicium deprecarer, sed praemium postularem. etenim si Scaevae, servo Q Crotonis, qui occidit L Saturninum, libertas data est, quod equiti Romano praemium dari par fuisset? et, si C Marius, quod fistulas, quibus aqua suppeditabatur Iovis optimi maximi templis ac sedibus, praecidi imperarat, quod in clivo Capitolino improborum civium***

§ 31. **ex aetate** etc] that is, all men of military age (at least) were in the following of the consuls (the rare exceptions may be neglected): hence all those whom you can guess to have been grown up at that time are in all probability every whit as guilty as Rabirius. A very Ciceronian way of putting it.

Scaevae] this recognition of another person as the actual slayer of Saturninus is from an English point of view the only plea of any force contained in the speech. But see Introd E (*a*).

libertas] probably he would receive a reward in money as well. His master would be compensated out of the state chest for the loss of his services. See Livy XXXII 26 § 14, XXVI 27 § 9.

fistulas] these pipes were made by bending round sheet lead and soldering together the edges. See Rich, and Frontinus de aquis I § 25 *plumbea lammina...circumacta in rotundum.*

suppeditabatur] from the *aqua Tepula* no doubt. See Frontinus I § 8, Burn p 183. For the distribution of the water in Rome see Burn p lviii.

imperarat] so also say Plutarch Marius 30 *εἶλε δίψει· τοὺς γὰρ ὀχετοὺς ἀπέκοψεν*, Orosius V 17 § 7, [Aurel Vict] de viris illustr 73 § 10. Florus III 16 § 6 is discreetly neutral, while Appian bell civ I 32 says *καὶ βραδύνοντος (τοῦ Μαρίου) ἕτεροι τὸ ὕδωρ ἐπιῤῥέον ἐς τὸ ἱερὸν διέτεμον.*

Fragmenta a Niebuhrio e cod. Vaticano palimpsesto primum edita.

XII. 32. ***aret. itaque non senatus in ea caussa cognoscenda me agente diligentior aut inclementior fuit, quam vos universi, cum orbis terrae distributionem atque illum ipsum agrum Campanum animis, manibus, vocibus re*pudiavistis*.

33. idem ego, quod is, qui auctor huius iudici *est*, clamo praedico denuntio: nullus est reliquus rex, nulla gens, nulla natio quam pertimescatis: nullum adventicium, nullum extraneum malum est quo*d insi*nuare in hanc *rem publicam pos*sit: si immorta*lem* hanc civitate*m esse* voltis, si aeter*num hoc* imperium, si g*loriam* sempiternam *manere*, nobis a nostri*s cupi*ditatibus, a tu*rbulen*tis

§ 32. The following fragments were first discovered by Niebuhr in a palimpsest MS in the Vatican Library, probably in 1816, for his letters dated Rome Nov 20 and Christmas Eve of that year contain references to his discovery of lost fragments of Cicero's orations.

ea caussa] what this matter was, I am not sure. Probably the *lex agraria* of Rullus, for in his first speech (in the senate) against that proposal he says § 27 *errastis, si senatum probare ea quae dicuntur a me putatis, populum autem esse in alia voluntate.* See Introd F.

me agente] in a general sense of 'when I dealt with the business', almost 'on my motion', 'at my instance'. Not in the technical sense of *agere* (*cum populo*), for which see II in Verrem V § 173, Gellius XIII 16.

manibus] see on § 5. Plutarch Cic 12 tells us that the bill of Rullus was rejected.

§ 33. **is qui auctor** etc] See Introd E (*f* ii)^{7}.

clamo etc] it is not necessary to suppose that Labienus or Caesar had done anything of the kind.

praedico] this is the quantity, I think.

nullus est etc] compare de leg agr I § 26 *multa sunt occulta rei publicae vulnera, multa nefariorum civium perniciosa consilia; nullum externum periculum est, non rex, non gens ulla, non natio pertimescenda est: inclusum malum, intestinum ac domesticum est.* Also see generally Livy's preface, in particular §§ 4, 11, 12.

natio] 'tribe', expressing a less important aggregate than *gens*. Very often thus.

cupiditatibus] Sallust Cat 11—14 illustrates this.

hominibus *atque no*varum rerum *cupidis, ab intestinis malis*, a domesticis co*nsiliis* est cavendum.

34. hisce autem m*alis mag*num praesid*ium vo*bis maiores ve*stri re*liquerunt, vo*cem* illam consulis, 'qui *rem publicam* salvam esse *volunt'*. huic voci fave*te, Quirites, neque v*estro iudicio *abstu*leritis mihi..... neque eripueri*tis rei publicae* spem liberta*tis, sp*em salutis, spem *digni*tatis.

35. *quid fac*erem, si T Labie*nus c*aedem civium *feci*sset, ut L Satur*ninus*, si carcerem re*fregi*sset, si Capitoli*um cum armatis occupa*visset? facerem *idem, quo*d C Marius fe*cit, a*d senatum re*ferr*em, vos ad rem publicam *defe*ndundam co*hort*arer, armatus *ipse* vobiscum ar*mato* obsisterem. *nunc*, quoniam armorum suspicio nulla est, tela non video, non vis, non caedes, non Capitoli atque arcis obsessio est, sed accusatio perniciosa, iudicium acerbum, res tota a tribuno plebis suscepta contra rem publicam: non vos ad arma voca*ndos esse, verum* ad suffragia cohortandos contra oppugnationem vestrae maiestatis putavi.

itaque nunc vos omnes oro atque obtestor hortorque; non ita mos est, consulem cum es.....

XIII. 36....*t*imet: qui hasce ore adverso pro re publica cicatrices ac notas virtutis accepit, is ne quod

intestinis etc] later in the year he urged this point more strongly in pro Mur §§ 78—85, and in the speeches against Catiline *passim*.

§ 35. **carcerem**] perhaps this refers to what happened when Gracchus (Equitius, see on § 20) was a candidate for the tribuneship and, having raised an uproar, was imprisoned by Marius. For then, says Valerius Max IX 7 § 1 *populus claustris carceris convulsis raptum* [Equitium] *humeris suis per summam animorum alacritatem portavit.*

Capitoli atque arcis] see Burn's Rome and the Campagna pp 184 foll.

maiestatis] see on § 20.

§ 36. **cicatrices**] we need not suppose that these were very serious. Cicero no doubt would make

accipiat famae volnus perhorrescit: quem numquam incursiones hostium loco movere potuerunt, is nunc impetum civium, *c*ui necessario cedendum est, perhorrescit.

37. *n*eque a vobis iam bene *v*ivendi, sed hones*t*e moriendi facul*t*atem petit: neque tam *u*t domo sua frua*t*ur quam ne patrio *s*epulcro privetur laborat. nihil al*iud* iam vos orat atque *ob*secrat, nisi uti n*e se* legitimo funer*e et* domestica mor*te* privetis, ut eum, *qui* pro patria nu*llum* umquam mor*tis* *p*ericulum fugit, *in* patria mori pati*amini*.

38. dixi ad id tempus, q*uod* mihi a tribuno plebis pra*esti*tutum est: a vob*is* *peto* quaesoque, ut ha*nc* *me*am defension*em* pro amici pericu*lo* *fi*delem, pro rei publicae salu*te* consularem pu*te*tis.

ad aliquam lacunam huius orationis fragmentum pertinet, quod Servius ad Verg Aen I 13 *servavit his verbis.* Cicero pro Rabirio; 'et cum universo populo Romano tum vero equestri ordini longe carissimus'.

the most of a scratch. Klotz remarks that the two words of Hortensius' speech preserved by Charisius are '*cicatricum mearum*'.

§ 37. **patrio sepulcro**] to be deprived of this was a serious matter in ancient times. See Servius ad Verg Aen v 64, vi 152, Hearn's Aryan Household cc ii, iii. Cicero makes a similar appeal in pro Cluent § 201, pro Sulla § 89.

in patria] this is worked up more elaborately in pro Mil §§ 93—4.

§ 38. **pro amici periculo**] pro Mur § 10.

APPENDIX

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K. *multae inrogatio* and its probable connexion with exile and *infamia.*

A. OF THE *SCTUM ULTIMUM.*

It will be best to begin the consideration of this subject by transcribing in full some of the most important passages in ancient authors relating thereto.

(1) Sallust Cat 29 §§ 2, 3 *itaque, quod plerumque in atroci negotio solet, senatus decrevit darent operam consules ne quid res publica detrimenti caperet. ea potestas per senatum more Romano magistratui maxima permittitur, exercitum parare, bellum gerere, coercere omnibus modis socios atque cives, domi militiaeque imperium atque iudicium summum habere; aliter sine populi iussu nullius earum rerum consuli ius est.*

(2) Caesar bell civ I 5 *decurritur ad illud extremum atque ultimum senatusconsultum, quo nisi paene in ipso urbis incendio atque in desperatione omnium † illata † sceleratorum audacia numquam ante descensum est; dent operam consules praetores tribuni plebis quique pro consulibus sint ad urbem ne quid res publica detrimenti capiat. haec senatusconsulto perscribuntur a d VII idus Ianuarias.*

(3) Cicero ad fam XVI 11 § 2.....*ad Caesarem cum Curione profecti erant postea quam senatus consulibus praetoribus tri-*

bunis pl et nobis qui pro coss sumus negotium dederat ut curaremus ne quid res publica detrimenti caperet.

(4) philippic II § 51 *in te, M Antoni, id decrevit senatus et quidem incolumis, nondum tot luminibus extinctis, quod in hostem togatum decerni est solitum more maiorum.*

(5) philippic V § 31 *tumultum decerni iustitium edici saga sumi dico oportere, dilectum haberi sublatis vacationibus in urbe et in Italia praeter Galliam tota.*

§ 34 *consulibus totam rem publicam commendandam censeo, eisque permittendum ut rem publicam defendant provideantque ne quid res publica detrimenti accipiat.*

(6) Livy III 4 § 9 *tantumque terrorem incussere patribus ut, quae forma senatus consulti ultimae semper necessitatis habita est, Postumio alteri consulum negotium daretur videret ne quid res publica detrimenti caperet*[1].

VI 19 § 3 *decurritur ad leniorem*[2] *verbis sententiam, vim tamen eandem habentem, ut videant magistratus*[3] *ne quid ex perniciosis consiliis M Manli res publica detrimenti capiat.*

(7) Dion Cassius XXXVII 43 § 3 *οἱ βουλευταὶ συνῆλθον αὐθημερὸν ἐς τὸ συνέδριον καὶ τά τε ἱμάτια ἠλλάξαντο καὶ τοῖς ὑπάτοις τὴν φυλακὴν τῆς πόλεως, ὥστε μηδὲν ἀπ' αὐτῆς ἀποτριβῆναι, ἐπέτρεψαν.*

XL 49 § 5 is in almost the same words, and in XLVI 31 § 2 we find *ἐκεῖνο δὴ τὸ εἰθισμένον τῷ δόγματι προσγράψαντες, τὸ μηδὲν ἀπ' αὐτῆς ἀποτριβῆναι.*

(8) Asconius in Milon p 35 (of the state of things after the death of Clodius) *fiebant interea alii ex aliis interreges, qui comitia consularia...habere non poterant. itaque primo factum erat senatusconsultum ut interrex et tribuni plebis et Cn Pompeius, qui pro consule ad urbem erat, viderent ne quid detrimenti res publica caperet, dilectus autem Pompeius tota Italia haberet.*

[1] This was a case of external danger. The other consul was at the time besieged in his camp by the Aequi.

[2] Some had called for another Ahala to make short work with Manlius like another Maelius.

[3] Tribunes with consular powers and tribunes of the *plebs*.

(9) Asconius in Cornel p 57 *promulgavitque legem*[4], *qua auctoritatem senatus minuebat, ne qui nisi per populum legibus solveretur. quod antiquo quoque iure erat cautum: itaque in omnibus senatusconsultis quibus aliquem legibus solvi placebat adici erat solitum ut de ea re ad populum ferretur; sed paulatim ferri erat desitum, resque iam in eam consuetudinem venerat ut postremo ne adiceretur quidem in senatusconsultis de rogatione ad populum ferenda.* [The senatorial leaders opposed Cornelius, and a tribune interposed to stop him. Then, after much debate in the senate, Cornelius proposed] *ne quis in senatu legibus solveretur nisi* CC *adfuissent, neve quis, cum solutus esset, intercederet cum de ea re ad populum ferretur. haec sine tumultu res acta est: nemo enim negare poterat pro auctoritate senatus esse eam legem; sed tamen eam tulit invitis optimatibus*[5].

I now proceed to examine under several heads this proceeding, which is often for briefness' sake called *sctum ultimum.*

(1) It seems to have had very much the effect of 'proclaiming a state of siege,' and was intended to strengthen the hands of the magistrates (consuls especially) in dealing with extraordinary emergencies by practically relieving[6] them of responsibility for any illegal acts that they might be driven to commit in the rapid execution of their duty. It was in short a quasi-dictatorial power: and as, since the days of the second Punic war, the dictatorship had fallen into disfavour[7] with the *optimates*, it was found convenient to develope by

[4] This seems to have happened in 67 BC. See also Dion Cass XXXVI 39 (22), Halm on Cic de imp Cn Pomp § 62.

[5] The bearing of this extract will be seen on reading (6) below.

[6] Zumpt maintains that it covered all acts of violence committed while the enemy still offered resistance. The crime charged to Rabirius was the murder *post fidem datam* (see § 28) more than anything else. Besides Rabirius was *privatus*.

[7] See Mommsen hist bk II c II (vol II p 378). Zumpt objects to the comparison with the dictatorship. He shews that *provocatio* was not done away with, but that the state of siege only lasted till resistance ceased, when *provocatio* revived. This however was enough for the purpose, and a dictator might when the crisis was past be found a nuisance.

use this presumed right of the senate. They thus held in reserve a power which was practically equivalent to the dictatorship and at the same time under the efficient control of their whole body. Whether it was as wholesome a constitutional appliance as the old dictatorship may well be doubted.

(2) It could be employed to meet both external and internal dangers: but the course of events determined that it should be applied chiefly[8] to cases of the latter kind. And this made it all the more convenient as a weapon of the senatorial party to be used in the suppression of troublesome demagogues and conspirators.

(3) The form of words employed in conferring this power on the magistrates may have varied slightly on different occasions, but I think we are justified in saying that the words *ne quid res publica detrimenti capiat* were always retained. The loose expressions[9] of writers who are not quoting the form do not make exceptions; and I have endeavoured in my note on § 20 of the pro Rabirio to shew that that passage is not to be regarded as containing a direct quotation.

(4) If the senate thought fit, it might declare that a 'state of uproar' or 'war in Italy' existed (*tumultum esse*) and call upon all citizens to don the dress of war (*saga sumere*); the consul declared public business suspended (*iustitium edicere*), and the shops and offices were closed. But these are minor details.

(5) It was a more definite step when the senate proceeded formally to outlaw (*hostem iudicare*) a certain person by name. This was done[10] in the latter days of the Republic,

[8] The proceeding against Tib Gracchus is the beginning of its regular employment as a party weapon, and the refusal of Scaevola to act upon it then shews that he held it unconstitutional. Mommsen Staatsrecht I pp 664—5.

[9] See for instance pro Deiotaro § 11, Plut C Gracchus 14, Cic 15, Dion Cass XLI 3, XLII 23.

[10] See in Catil IV § 10, Nepos Att 9 § 2, Suet Aug 17, Appian bell civ I 60, III 63, IV 38; in I 32 he says of Saturninus Glaucia etc καὶ αὐτοὺς τῆς βουλῆς ἀναιρεθῆναι ψηφισαμένης. Compare pro Rabirio §§ 18, 31.

and was held by the supporters of the senatorial policy to be a complete justification of all acts of violence perpetrated in the interests of order. To reward the slayer of such a public enemy was only a logical consequence of such a declaration.

(6) The most important point in this enquiry is the question of legality. Was this action of the senate constitutional, or was it not? A statement of the evidence under various heads will furnish the answer.

(*a*) There was no *lex* in grant or confirmation of the right in question.

(*b*) When we find any reference to its basis, it is in effect made to rest on use and custom only. The very anxiety of Cicero[11] to give it the appearance of immemorial antiquity arises from a consciousness of the lack of other authority.

(*c*) We know that Cicero was himself called to account for his action against the associates of Catiline, which was taken under the supposed protection[12] of the *sctum ultimum*. The prosecution of Rabirius was a challenge to the senate on the same ground.

It is thus pretty clear that the action of the senate was not[13] in a strict sense legal. But that it had not become constitutional by use can hardly be maintained in the face of the words of Sallust and Caesar quoted above. At what date the procedure was first employed, we do not know, nor is it material to enquire: its real constitutional importance dates (as I have shewn above) from the third century BC. As in the practice of granting special dispensations[14] from the operation of certain statutes, no doubt the senate assumed the right at a favourable moment, and then in the gradual

[11] In addition to the quotations above, see pro Rab §§ 2—5, pro Mil §§ 8, 70.

[12] Zumpt shews that the *sctum* could not relieve Cicero from responsibility, nor did Cicero ever plead this. And Clodius had to carry a law on purpose before he could attack Cicero with effect.

[13] Zumpt seems to make it out to be legal, but not (I think) with success.

[14] See Asconius (9) quoted above, and de legibus II § 14.

accumulation of precedent the original usurpation was lost sight of: it was no doubt also true to the traditions of its body in the way of avoiding any definition of its powers in this direction, well knowing that definition must bring limitation.

Had the tribunes checked this encroachment of the senate at an early stage they would have deprived the aristocratic party of a weapon which in the last century of the Republic was often employed against the democrats with terrible effect: as it was, they began their struggle too late, and, though Pompeius allowed them to make an example of Cicero, they saw the senate still in possession and use of this power after the death of Caesar.

I have only to add that the subject of this enquiry well illustrates one of the most fatal constitutional weaknesses of Republican Rome—the great practical control of the magistrates by the senate, a body which was after all powerless against any decided movement of the *comitia* of the tribes. Thus the degradation of the Legislature and Judicature was accompanied or even preceded by a wretched weakening of the Executive.

[See Lange's Römische Alterthümer I pp 728—9, II p 398, Madvig's Verfassung und Verwaltung des Römischen Staates I pp 301—3, Zumpt's Criminalrecht I 2 pp 397—416.]

B. OF *PECULATUS*.

It will be best to begin by quoting a few of the most notable passages relating to the subject.

(1) Varro de ling Lat V § 95 (speaking of *pecus*) *hinc peculatum publicum*[1] *primo, tum cum pecore diceretur multa*[2] *et id esset coactum in publicum, si erat aversum.*

[1] The expression used here and in Livy XXXIII 47 §§ 1—3 does not imply that *peculatus* ever meant 'theft' simply. There is no trace of such an original meaning. Rein p 673.

[2] For these fines see also Festus p 202, Cic de republ II §§ 16, 60, Pliny nat hist XVIII § 11.

(2) Festus p 213 *peculatus est nunc quidem qualecunque publicum furtum, sed inductum est a pecore, ut pecunia quoque ipsa*...etc. p 237 *peculatus furtum publicum dici coeptus est a pecore, quia ab eo initium eius fraudis esse coepit, siquidem ante aes aut argentum signatum ob delicta poena gravissima erat duarum ovium et XXX bovum*...etc.

(3) Cicero II. in Verrem I § 11 (after speaking of his stealing state money and corn) *erunt etiam fortasse, iudices, qui illum eius peculatum*[3] *vel acerrime vindicandum putent, quod iste M Marcelli et P Africani monumenta, quae nomine illorum, re vera populi Romani et erant et habebantur, ex fanis religiosissimis et ex urbibus sociorum atque amicorum non dubitarit auferre.*

(4) philippic XII § 12 *sestertium septiens miliens avertisse Antonium pecuniae publicae iudicavistis: num fraude poterit carere peculatus?*

(5) pro Murena § 42 (of the charge allotted to Sulpicius[4] as praetor) *quid tua sors? tristis, atrox: quaestio peculatus, ex altera parte lacrimarum et squaloris, ex altera plena tabularum*[5] *atque indicum. cogendi iudices inviti, retinendi contra voluntatem; scriba damnatus, ordo totus alienatus; Sullana gratificatio reprehensa, multi viri fortes et prope pars civitatis offensa; lites severe aestimatae; cui placet obliviscitur, cui dolet meminit.*

(6) rhet ad Herenn I § 22 *si quis peculatus accusetur quod vasa argentea publica de loco privato*[6] *dicatur sustulisse, possit dicere, cum definitione sit usus quid sit furtum quid peculatus, secum furti agi non peculatus oportere.*

(7) Gellius XI 18 § 18 *sed enim M Cato in oratione quam de praeda militibus dividenda scripsit vementibus et illustribus verbis de inpunitate peculatus atque licentia conqueritur. ea*

[3] In III § 168 Cicero declares that the lending of public money at interest is really *peculatus*. But his words do not shew that it was such by law. Under the Empire this offence was visited with various penalties, as is pointed out by Rein, who thinks that it was probably even dealt with by the *lex Iulia de peculatu*.

[4] In the year 65 B C.

[5] Put in as evidence. See I in Verrem § 33, pro Fonteio § 12. I have no doubt that this reading of Zumpt, now accepted by Halm, is right.

[6] The emphasis is of course on *privato*.

verba, quoniam nobis impense placuerunt, adscribsimus: 'fures' inquit 'privatorum furtorum in nervo atque in compedibus aetatem agunt, fures publici in auro atque in purpura.'

(8) Isidorus V 26 *peculatus iudicium in eos datur qui fraudem aerario faciunt pecuniamque publicam intervertunt. nam a pecunia peculatus est dictus. non autem sic iudicatur furtum publicae rei sicut rei privatae: nam ille sic iudicatur ut sacrilegus, quia fur est sacrorum*[7].

From our evidence we may draw the following inferences.

(1) The term *peculatus* had its origin in denoting the theft of the beasts paid as fines to the state; but the employment of coined money and the development of a more complex civilization caused an extension of its meaning so as to include the theft of any kind of state property. As instances of *peculatus* in this wider sense we can point to cases[8] of misappropriation of the booty or war-indemnity by victorious generals, embezzlement of public moneys by state officers to whom they had been entrusted for public purposes, of corn and money by provincial governors, of sacred objects statues etc by the same, fraud on the part of a state contractor[9], etc.

(2) The offence was no doubt originally dealt with by a *iudicium populi*, the clumsy appliance of a community still in an early stage of growth. Men's conception of wrong done to the state being very hazy, they carry out the trial and punishment of individual offenders by separate legislative acts[10] as occasions successively require. As a rough definition of this or that class of offence is worked out in practice, and the inconvenience of the old procedure is more strongly felt, it becomes possible to legislate on the subject in general terms, and to delegate the administration of the law so enacted to a

[7] Quoted by Rein.

[8] Collected by Rein, Crim p 679 foll.

[9] See Livy XXV 3, 4, with Weissenborn's notes. The word *peculatus* is not used there, and was perhaps not yet employed to designate a particular crime in the days of the Hannibalic war.

[10] See Maine's Ancient Law c 10.

permanent tribunal.. Thus *peculatus* was in some way defined, and brought under the cognizance of a *quaestio perpetua*[11]. The precise date of this step I am unable to determine. The passage in the rheortical treatise addressed to Herennius seems certainly to refer to a time when the offence had been defined, and we may probably assume that the *quaestio perpetua peculatus* was already in full course of work. The treatise is assigned[12] to the year 84 B C or later. This inclines me to think that the court was already established before the dictatorship of Sulla, and not in the first instance by a *lex Cornelia* of that legislator. Indeed the existence of a *lex Cornelia de peculatu* is nowhere (so far as I can discover) directly attested, and Lange[13], who hesitatingly assumes it, seems to make out but a weak case. The *a priori* likelihood of such an enactment proceeding from Sulla I do not deny. All I can admit for certain is that the standing court was in existence before B C 70, the year of the trial of Verres.

(3) As to the penalties inflicted on the guilty in earlier times we have no satisfactory information. Probably they varied according to the degrees of guilt in the accused and punishment called for by the accuser. Restitution would no doubt be enforced by a money fine; whether of greater amount than the peculations, is not certain. This would probably be accompanied[14] by *infamia*, and (in very bad cases at least) by *aquae et ignis interdictio* and confiscation of the offender's property. Of the effects of conviction under the *quaestio perpetua* we have fuller knowledge. The condemned criminal lost his civic rights and became *infamis*. Besides this, exile—voluntary in theory—might[15] be enforced by *aquae*

[11] Perhaps at first that of the existing *quaestio repetundarum*. See Introd C (*p*).

[12] Journal of Philology vol X pp 197 foll, Teuffel's Geschichte der Röm Literatur § 162.

[13] Römische Alterthümer III p 166. He only refers to I in Verrem § 39, II in Verrem I § 11, III § 83, pro Cluent § 147. The ingenious argument of Zumpt II 2 pp 78—9 proves what I admit here, but not (I think) his own further conclusions.

[14] See appendix K.

[15] Not necessarily. I understand Zumpt II 2 p 89 to take substantially the same view.

et ignis interdictio. And in cases of *peculatus* as in those of *repetundae* the jury were called upon to hold a second enquiry[16] in order to fix the amount of money penalty to be demanded by way of restitution. Whether an equal or multiple value was exacted, I cannot learn; but I am inclined to conjecture that it was double the amount of the peculation, as was the case in *repetundae* under a clause[17] of the *lex Acilia.* This proceeding, called *litis aestimatio*, gave to the jury an opportunity of mitigating the punishment of a man whom they had in the first trial been unable or unwilling to acquit; and they not seldom availed themselves of it.

(4) It may be well to add that a *lex Iulia* of Julius Caesar or Augustus[18]—the former, I rather think—dealt fully with the offence and penalties. It included[19] tampering with the imperial coinage and with instruments and documents of public importance. And it seems to have fixed the amount of restitution required at four times[20] the amount of the peculation (*in quadruplum*) as another *lex Iulia*[21] did in the case of *repetundae.* The other penalties seem to have remained in effect much the same[22].

(5) It is further to be noted that the *lex Iulia* here referred to also included by name sacrilege (*de sacrilegis*) and misappropriation of the public funds by persons entrusted therewith (*de residuis*). This is interesting as illustrating[23] the history of jurisprudence. The old *peculatus* was wide enough to include all these and indeed *repetundae* as well: so that it was not always clear under which of these heads the acts of a particular offender would be most appropriately ranged. But as the growth of criminal jurisprudence produced more precise

[16] pro Mur § 42, pro Cluent §§ 115—6. Zumpt II 2 p 89 remarks that the *litis aestimatio* rendered confiscation unnecessary. See also I in Verrem § 38.

[17] See lines 58—9 of this law in Wordsworth's Fragments and Specimens p 185. A comparison of div in Caecil § 19 with I in Verrem § 56 may suggest a rate of 2½ times the amount.

[18] Zumpt thinks it was the latter.

[19] Digest XLVIII 13 §§ 1, 10.

[20] Julius Paullus V 27.

[21] This was certainly a law of Julius Caesar.

[22] Digest XLVIII 13 § 3.

[23] See Introd C (*p*) note 47, Maine's Ancient Law c 10.

classification of crimes the terminology was enlarged before a statutory separation took place.

(6) It now remains to apply the above to the explanation of pro Rabirio § 8. I cannot agree with Rein that the burning of the *tabularium* was the act characterized by the accuser as *peculatus*. It seems far more likely[24] that Curtius had been charged with (*a*) some more direct act of *peculatus* (*b*) an incendiary act for the purpose of suppressing the evidence[25] of the former. That this latter act might from one point of view have been regarded as *peculatus*, I do not deny: but I think the words of Cicero point more naturally to the conclusion I have ventured to draw. Whether the juxtaposition of the reference to a sacrilegious act (§ 7) is in any way significant, I cannot say. The information is too scanty to warrant even a conjecture.

[See generally Rein's Criminalrecht pp 672—90. I cannot however say that my debt to him is very great.]

C. OF THE *AQUAE ET IGNIS INTERDICTIO.*

The most interesting passages bearing upon this subject are the following

(1) Cicero, de domo sua § 78 *qui erant rerum capitalium condemnati non prius hanc civitatem amittebant quam erant in eam recepti quo vertendi, hoc est mutandi, soli causa venerant; id autem ut esset faciundum, non ademptione civitatis sed tecti et aquae et ignis interdictione adigebantur.*

(2) Cicero, pro Caecina § 100 *nam quod ad exsilium attinet, perspicue intelligi potest quale sit. exsilium enim non supplicium est, sed perfugium portusque supplici. nam qui volunt aliquam poenam subterfugere aut calamitatem, eo solum vertunt, hoc est, sedem ac locum mutant. itaque nulla in lege nostra reperietur,*

[24] This I find to be also the view of Huschke p 515.

[25] See II in Verrem III § 83, pro Mil § 73.

ut apud ceteras civitates, maleficium ullum exsilio esse multatum. sed cum homines vincula neces ignominiasque vitant, quae sunt legibus constitutae, confugiunt quasi ad aram in exsilium. qui si in civitate legis vim subire vellent, non prius civitatem quam vitam amitterent: quia nolunt, non adimitur iis civitas, sed ab iis relinquitur atque deponitur. nam cum ex nostro iure duarum civitatium nemo esse possit, tum amittitur haec civitas denique, cum is, qui profugit, receptus est in exsilium, hoc est, in aliam civitatem.

(3) Cicero, philippic VI § 10 [*Plancum*] *sic contemnit tamquam si illi aqua et igni interdictum sit.*

(4) rhet ad Herenn II § 45 *...aut proinde quasi non omnes, quibus aqua et igni interdictum est, exsules appellentur*[1].

(5) Paulus in Digest XLVIII 1 § 2 *capitalia sunt* [*iudicia*] *ex quibus poena mors aut exsilium est, hoc est aquae et ignis interdictio; per has enim poenas eximitur caput de civitate. nam cetera non exsilia sed relegationes proprie dicuntur: tunc*[2] *enim civitas retinetur.*

The following account of this remarkable capital penalty is all or nearly all taken from Zumpt's Criminalprocess pp 451—467, though the matter is arranged in somewhat different order from that followed in the German work.

When the old penalty of death had (at least in the case of political offences) ceased to be imposed[3] by sentence of the *iudicia populi*, the Romans did not introduce an equivalent punishment in its place, but determined in a legislative form[4] the penalties for the several offences according to the merits of the cases as they arose. Hence the various degrees of this penalty which will shortly be distinguished.

First it should be noted that exile as such was not a

[1] The remark refers only to conversational usage, not to legal terminology.

[2] I am not sure whether this means that the *civitas* was formally taken away in *exsilium*: anyhow it refers to the practice of a long time after Cicero.

[3] It was not abolished, Madvig II p 292. But we hear of no executions since Manlius, Lange II 519.

[4] See appendix B § 2.

Roman punishment. The only exception to this was created by the *lex Tullia de ambitu* carried by Cicero[5] in his consulship: this imposed ten years exile on candidates found guilty of corrupt practices. But, barring this, it was and long remained[6] true that exile was a refuge from punishment and not a punishment itself. Yet we know that many persons were driven into exile, though not formally exiled. How was this? They were 'interdicted from fire water and shelter'; that is to say, outlawed or laid under ban.

This proceeding did not deprive a man of his *civitas*: he still remained *civis*, but he lost *caput*, having in effect lost the means of enjoying his privileges as a citizen. Not until he had actually been made a citizen[7] of some other community (residence of course went for nothing) did he cease to be a citizen of Rome.

The origin of this penalty is to be sought in times when the punishment of death was still in common use. The accused fled beyond the Roman frontier, and in order to bar his return it became the practice[8] to lay him formally under ban. When the punishment of death had ceased to be applied to political offenders, it was only natural that this penalty should take its place; and also that it should become the severest sentence of the permanent courts. For the presence or absence of the *reus* made no difference[9] in the matter or

[5] pro Mur §§ 47, 89, pro Planc § 83, Holden's introd to pro Planc § 16.

[6] For the change see Digest XLVIII 19 6 § 2 *et sunt poenae quae aut vitam adimant aut servitutem iniungant aut civitatem auferant aut exsilium aut coercitionem corporis contineant.* Such expressions as pro Cluent § 29 *quem leges exilio natura morte multavit* are loose and apply only to the effect in practice. See also appendix K.

[7] See pro Caecina quoted above, and pro Balbo § 31. It should be said that Madvig Verf und Verw I p 55 is decidedly of opinion that the *civitas* was lost by outlawry, and that Cicero's distinction is nugatory. See Lange I 207—8. Indeed it is hard to see how a man whose life and honour were no longer protected could have remained technically *civis*.

[8] Thus Kaeso in Liv III 13 and the decemvirs III 58 § 9 were probably outlawed. See the cases of Postumius XXV 4 §§ 9—11, and Fulvius XXVI 3 § 12, where the decision is given by the Tribes, no trial taking place on the occasion. Zumpt Criminalrecht I 2 p 281. See Madvig II pp 288—90.

[9] It was the same for Milo as for Verres, for Oppianicus and Scamander as for C Fabricius.

form of the sentence; and it is manifest that this was the only penalty capable of being applied in all cases.

The penalty was outlawry, the consequences varying with the severity of the sentence and the circumstances of the case. The ancient form employed was a declaration that the outlaw was prohibited from fire water and shelter. And in early times, when the bonds of state union were stronger, the denial of these common elementary wants would probably mean utter destruction to the victim of such a ban. But as the old sentiments relaxed it became necessary, if the outlaw was to be deprived of life or residence on Roman ground, to introduce special penalties for the secondary offenders, those who did not help in giving effect to the sentence of the state.

The three principal degrees of this punishment may be distinguished as follows.

i. The man was outlawed in the usual form, but no limits were named within which alone the outlawry should hold good. Thus it extended over the known world so far as Roman law or influence could reach. Sometimes a reward was offered to any that should betray the outlaw or put him to death. One very extreme sentence[10] rendered all that gave succour to the outlaw liable to the same penalty themselves. This was a rare and exceptionally severe form of the penalty, and was applied only[11] in such cases as the proscriptions of Sulla and the Triumvirs and against the murderers of Caesar by the Pedian law.

ii. The man was outlawed in the usual form, but a limit of so many miles from Rome was named, outside which he was free from the ban. No reward was offered for his betrayal or murder; but minor penalties were provided for succouring him. This was the common form[12] of outlawry

[10] Appian bell civ IV 11.

[11] Confiscation of goods generally if not always was attached to such outlawry as this. Lange II 540 declares that if the capital sentence was actually passed on a man by the centuries, confiscation always followed.

[12] Confiscation entire or partial sometimes was attached to this outlawry.

and was employed by Saturninus[13] against Metellus and by Clodius against Cicero.

iii. The man was outlawed in the usual form, a limit was named, but the execution of the sentence does not seem to have been enforced by rewards or penalties as in the above. The outlaw might be put to death by anyone without fear of punishment. Thus a public penalty was left to be carried out by the capricious action of private hatred. This was a peculiar form of outlawry applied to secondary offenders, the succourers of those outlawed under (ii). But, while the harder forms of outlawry were only used in sentences pronounced by *iudicia populi*, it seems most probable that this form was also the 'capital penalty' of the permanent jury courts. Instances of this are to be found in the cases of (*a*) the risk run[14] by the friends of Cicero in giving him succour (*b*) the cases of the elder Oppianicus and of Verres, as simple criminals.

The consequences of these different degrees of outlawry would be respectively (i) Death or the imminent risk of it, (ii) Exile, (iii) A certain amount of risk of death, to be avoided by exile, and generally a wretched despised outcast existence.

It is interesting in this connexion to consider the expressions employed by Cicero in the perorations of his speeches on behalf of men accused on capital charges before the jury courts. We find that in such cases as that of Sextus Roscius and that of Cluentius he speaks[15] of the accused as standing in danger of his life. In such as those of Sulla Sestius Caelius and Plancius he lays[16] the stress on the banishment which must follow condemnation. The difference is to be accounted for by observing that the former were merely cases of ordinary crime, while the latter were essentially political in their bearing. It is not however to be inferred that there was any difference in the penalty: the difference lay in the

[13] Appian bell civ I 31.

[14] This was practically not great.

[15] pro Rosc Am §§ 146, 150, pro Cluent § 200.

[16] pro Sulla § 89, pro Sest § 146, pro Cael § 77, pro Planc § 102.

classes of men against whom the different charges would commonly be brought. The latter kind would generally affect only men of wealth and position, who would be able to avail themselves of the protection afforded by exile against the hardships to which meaner criminals were forced to submit[17].

Two changes in respect of the mildest form of this penalty, that inflicted by the permanent courts or in the provinces by the governors' courts, took place before the establishment of the empire. First, an edict of the tribunes of B C 72 ordained[18] that no one who had been found guilty of a capital offence should remain in Rome. Second, it seems that Caesar when dictator added[19] a money fine, which in the case of parricides extended to confiscation of a man's whole property.

This last was indeed a very important change. For so long as the outlaw could go abroad, taking his money with him, the intention of such sentences was ever being flagrantly evaded. Some pleasant provincial town, glad to engage in its interest one who most likely had still many powerful friends at Rome, afforded him a comfortable asylum where he would feel no deprivation save of the political intrigues of the capital. But when a poor man had been thus outlawed, his condition[20] was pitiable in the extreme. Driven from Rome, excluded from the municipal towns, exposed without protection to all manner of hardship and wrong, his life depending on the forbearance of his enemies, his scanty property at the mercy of his neighbours' cupidity or spite,—life must to such have been hardly worth the keeping. All this the wealthy man was able to avoid by residence abroad; all this he incurred if while outlawed he ventured to return.

[17] Mr Reid writes to me that this suggestion as to the different effect of the punishment on men of different social standing seems hardly to meet the difficulty; an opinion in which I heartily concur, but I must leave this difficulty for the present.

[18] See II in Verrem II § 100. It seems from pro Cluent § 175 that the prohibition was maintained by the tribunes of the following year.

[19] Suet Jul 42. It was an old principle that the capital penalty should not be joined with a money fine, Cic de domo § 45. Confiscation seems to have been different in kind, Huschke p 192.

[20] pro Cluent § 175.

D. OF THE *LEX FABIA*.

The *lex Fabia de plagiariis*[1] was most likely passed in the last century of the Republic, or a little earlier; and it continued to be much used and commented on in the imperial times. It dealt with[2] the offence of kidnapping concealing detaining buying selling etc (*a*) a Roman citizen freeborn or freed (*b*) a free Latin (*c*) the slave of another man—the same being done with knowledge and *dolo malo*. The trials under this law were so far as we can gather always *iudicia publica*. The penalty following on conviction was at one time a money fine, but it was afterwards made more severe and varied, according to the rank and quality of the offender, from a fine with banishment for life to crucifixion or slavery in the mines. The money fine was naturally accompanied by *infamia*.

How the offence had been dealt with before the *lex Fabia* is not certain: possibly (as Rein suggests) variously according to circumstances, either by a *iudicium populi* or by the interdict *de homine libero exhibendo* or by *actio furti* or *actio servi corrupti*.

The mere fact of there being need of such a law speaks volumes as to the horrible condition of Italy, both social and economic, in the age after the Punic wars.

[For more detailed account of this law see Rein's Criminalrecht pp 386—9, Lange's Römische Alterthümer II pp 617—8, III p 5, to the former of which I am greatly indebted.]

[1] This title may perhaps have been in current use from the first. Cicero uses the word *plagiarius* in ad Quint frat I 2 § 6. For the metaphorical use see Martial I 52. In a wall writing at Pompeii occurs the expression *Venus plagiaria est*.

[2] See Julius Paullus sent V 6 § 14, Mos et Rom legum collat 14, digest XLVIII 15, instit IV 18 § 10, codex IX 20. Zumpt points out that pro Cluent § 21 gives a case. See also Ramsay on § 162.

E. OF THE *LEX PORCIA* (*LEGES PORCIAE*).

The most important passages relating to this subject are these.

(1) Livy X 9 §§ 3—6 *eodem anno M Valerius consul de provocatione legem tulit diligentius sanctam*[1]. *tertio ea tum post reges exactos lata est, semper a familia eadem. causam renovandae saepius haud aliam fuisse reor quam quod plus paucorum opes quam libertas plebis poterat. Porcia tamen lex sola pro tergo civium lata videtur*[2], *quod gravi poena, si quis*[3] *verberasset necassetve civem Romanum, sanxit; Valeria lex, cum eum qui provocasset virgis caedi securique necari vetuisset, si quis adversus ea fecisset, nihil ultra quam 'inprobe factum' adiecit. id, qui tum pudor hominum erat, visum credo vinculum satis validum legis; nunc vix servus ero ita minetur quisquam.*

(2) Cicero de re publ II § 54 (after speaking[4] of Valerian laws) *neque vero leges Porciae, quae tres sunt trium Porciorum, ut scitis, quicquam praeter sanctionem*[5] *attulerunt novi.*

It is first to be remarked that Livy speaks of but one *lex Porcia*, as indeed do all other writers in referring to this subject, Cicero included, with exception of the one passage quoted above. But Weissenborn well points out that Livy after mention of three Valerian laws on *provocatio* goes on to speak of *Valeria lex* apparently referring to all three none the less. And from this he fairly argues that when he says

[1] He is probably thinking of the technical sense of *sanctio* (penal clause in a law), for which see Justinian inst II 1 § 10. Weissenborn. But the application here is loose. In fact the real means of enforcement would be found in the capricious penalties inflicted by *iudicia populi* when offenders were impeached. They could if they chose bring the words *improbe factum* home to a transgressor with ample force.

[2] The view of Livy himself, or of the authority whom he is here following. W.

[3] Any magistrate, that is. W.

[4] The dialogue is supposed to be held in the time of the younger Scipio Africanus.

[5] See *gravi poena...sanxit* above.

Porcia lex he is in like manner including the three *leges* of members of the *gens Porcia* under a singular appellation. In the next place we may observe that Livy lays stress on the lack of penal *sanctio* in the Valerian legislation, and seems to mean that this defect was remedied by the Porcian; wherein he and Cicero, whose words are more definite, perfectly agree. Whether they are right in affirming so direct a connexion between the Porcian laws[6] and those concerned with the right of appeal is not certain. It should also be noted that the protection of the backs of citizens was according to Livy the object of the Porcian legislation and of that alone.

Accepting the statement that there were three Porcian laws and that they were carried by three different members of that house, we are unfortunately unable to determine with certainty when and by what persons they were severally carried. A fair degree of probability is alone attainable. Lange[7] observes that we only know of three magistrates of the *gens Porcia* in the period[8] to which these laws must belong; and to these he proceeds to assign the three laws, the enactments of which have to be gathered from a very meagre body of evidence.

i. The passages most important for the consideration of the first Porcian law are the following:

> (1) Festus p 234 '*pro scapulis*' *cum dicit Cato*[9], *significat pro iniuria verberum. nam complures leges erant in cives rogatae quibus sanciebatur poena verberum. his significat prohibuisse multos suos cives in ea oratione quae est contra M Caelium* [The fragment following is too obscure to be of any use].

[6] Laws 2 and 3 would either extend the right of appeal or grant the exemption in question whether the citizen appealed or not. In practice these two alternatives come to much the same.

[7] Römische Alterthümer II p 233.

[8] Between 300 and 129 B C, the passing of the third *lex Valeria* and the death of the younger Africanus.

[9] The interest taken by Cato in the subject may also be gathered from the fragment quoted by Gellius X 3 § 17.

(2) Livy III 20 § 7 (the tribunes argued that if the army when in the field were formed into an assembly) *omnes id iussuros quod consules vellent; neque enim provocationem esse longius ab urbe mille passum*[10]*, et tribunos, si eo veniant, in alia turba Quiritium subiectos*[11] *fore consulari imperio.*

(3) Sallust Cat 51 §§ 21—2 *sed per deos immortalis quamobrem in sententiam non addidisti uti prius verberibus in eos animadvorteretur? an quia lex Porcia vetat? at aliae leges item condemnatis civibus non animam eripi sed exsilium*[12] *permitti iubent.*

§§ 39, 40 *sed eodem illo tempore Graeciae morem imitati verberibus animadvortebant in civis, de condemnatis summum supplicium sumebant. postquam res publica adolevit et multitudine civium factiones valuere, circumveniri innocentes alia huiuscemodi fieri coepere, tum lex Porcia aliasque leges paratae sunt, quibus legibus exsilium damnatis permissum est.*

The conclusions[13] arrived at in respect to this law may also be ranged under heads.

(1) The first legislation in this direction must surely have proceeded from a 'friend of the people', not from a leader of the nobles. Now we know that M Porcius Cato had as a reformer great need of popular support: and we have evidence that he took an interest in this particular subject. It is therefore extremely probable that this law was carried by him, and further that it dates from his praetorship in 198 B C. Instead of appealing to meaner passions by proposing a land or corn law, it is quite in character with what we know of the great moral reformer that he should touch the nobler feeling of Roman pride. The nobles, at whose head was the elder Scipio, could of course offer no opposition

[10] For the measurement see Digest L 16 § 154.

[11] Compare XXIV 9 § 2.

[12] See on pro Rab § 16, and appendix C.

[13] Taken chiefly from Lange R A II pp 192, 520. See also I p 580.

to a measure which freed from stripes the backs of citizens who had fought and suffered in the Hannibalic war. Besides, the punishment of death had practically ceased to be inflicted by sentence of the people, and so men's minds were prepared for such a proposal.

(2) The law does not seem to have abolished the punishment of death, but only scourging and death preceded by scourging.

(3) It seems to have followed the precedent of the laws on *provocatio* in confining its operation[14] to the precincts of the city and a distance of one mile in every direction beyond.

(4) It repealed those penal clauses of former laws that contained provision for the infliction of such penalties.

(5) The penal clause of the law itself probably provided[15] that offenders should be 'interdicted from water and fire'.

(6) It was not strictly speaking a law on *provocatio*. Indeed it would tend to lessen the number of cases in which the need of the *provocatio* would arise.

ii. The second *lex Porcia* is supposed[16] to have been carried by P Porcius Laeca when he was praetor in 195 B C, the year of Cato's consulship. The political bearing of the measure and the main drift of its contents have been set forth as follows.

[14] Thus helping to complete the growing distinction between the *imperium militiae* and *imperium domi*. This head contains an inference probable in itself, and countenanced by the juxtaposition of the Valerian and Porcian laws in Livy x 9.

[15] See below § 7 of my exposition of Zumpt's view.

[16] Lange R A II pp 198, 520—1. Two known *denarii* having on them the names of their coiners, M PORC LAECA and P LAECA, bear in their stamp obvious allusions to the Porcian legislation. The latter may belong to the man mentioned in the text. But after reading Mommsen, Geschichte des Röm Münzwesens pp 526, 552—3, Nos 113, 161, and the criticism of Zumpt I 2 p 48—58, I can only say that, though the allusion is clearly to this law, it does not *prove* that P Porcius Laeca was its author. See Ramsay Rom Ant p 286 (Ed 9).

(1) Porcius Laeca was probably an adherent of the nobility, or he would not have been made[17] one of the *tresviri epulones* who were then (first time) appointed, doubtless under aristocratic influence. Now the benefit of the new law rested, as will be seen, almost entirely with the travelling capitalists. It is quite inconsistent with what we know[18] of the character and career of Cato that he should have proposed a measure to weaken the control of these gentry by the provincial governors. The law is therefore more probably to be regarded as a crafty move of his opponents. They outbid[19] him in the quest of popularity by carrying further the principle which he had made his own and consequently could not oppose. [And the selection of a Porcius as their tool for this purpose would have about it an ironical plausibility eminently Roman.]

(2) So far as can be gathered by a not too timid inference from a solitary fact, it appears that the principal enactment of this law was the extension of the privilege granted in that of Cato to all citizens living or carrying on civilian pursuits in Italy beyond the mile radius and in the provinces. At least we know that such an extension did take place[20] in the case of the provinces, and from this we may argue *a fortiori* to Italy. Indeed the spread of empire and dispersion of large numbers of citizens travelling on business about so many countries had made the old mile limit an absurdity. Its original intention had no doubt been to reserve the full *imperium* to the general in the field.

(3) That we do not hear of a single case of a provincial governor being impeached[21] before the people for a breach of this law, is easily accounted for. The governors knew better than to vent their displeasure on

[17] Livy XXXIII 42 § 1.

[18] See Livy XXXII 27 §§ 3, 4, and other passages.

[19] As they afterwards did Gaius Gracchus by the Livian laws of Drusus.

[20] Cic II in Verrem V § 163.

[21] For Cicero's threats to Verres see II in Verrem I § 13, V § 173.

Roman citizens, having the fear of a *iudicium populi* before their eyes; they had besides plenty of provincials to plunder and oppress if so inclined, victims whose cries were far less audible at Rome and who had for the most part to submit without any prospect of redress.

iii. The third *lex Porcia*, continues Lange[22], probably owes its origin to L Porcius Licinus consul in 184 B C when Cato was censor. It is treated as follows.

(1) This Porcius came of a family which had belonged to the nobility[23] at the time of the Hannibalic War. He had been praetor[24], and was a man of influence[25] and a faithful supporter[26] of the nobility. And the law itself, as will be seen, suits well with the decline of military discipline which followed the war with Antiochus. It also bears the stamp of the same desire to outbid Cato that has been detected in the second *lex Porcia*.

(2) Probably it was this law that gave the final extension to the principle of Cato by granting immunity from the degrading punishments in question to citizens[27] serving in the Roman armies. It did not lessen[28] the plenary *imperium* of the general; against this there was still to be no appeal. Nor did it abolish the punishment of death; it forbade the scourging of citizens with the cat (*verbera*)[29], and henceforth even the execution of a citizen by order of a court martial had to be carried out in a less[30] degrading manner. The sergeant's cane (*vitis*)[31] was now the only in-

[22] R A II pp 233—4, 521.

[23] Livy XXVI 6 § 1, XXVII 6 § 19, 35 § 1, 36 § 11, 46 § 5.

[24] Livy XXXIV 54 § 2.

[25] Livy XXXIX 32.

[26] Livy XXXIX 39.

[27] Sall Jug 69 § 4, Livy epit 57, Plut C Gracchus 9; the case in Livy epit 55 is so exceptional as to be no exception in this connexion, and probably the people had sentenced the man.

[28] Cic de re publ I § 63, de legibus III § 6.

[29] And probably also rods (*virgae*).

[30] See Polyb VI 37.

[31] Livy epit 57, note on pro Rab § 12

strument available for the chastisement of a citizen soldier.

(3) Thus at last the Roman in any part of the world where Roman law was respected could guard himself from cruel scourging by the plea *civis Romanus sum*. But the wanton and needless distinction thus made between the Roman and the Latin only served to impress more vividly on the latter the already present sense of his own inferior position, which the loyal service rendered in the second Punic war entitled him to regard as undeserved. This rankled in the minds of the Latin communities and bore bitter fruit for Rome at a later day.

I have now to speak of the view of Zumpt[32], which is in many important points different from that of Lange. For convenience sake I will take the chief of these points of difference one by one.

(1) He argues that Cato cannot have been the author of the first law, or we should have found mention of it in Plutarch's account of his life. The quotation from Festus (see above) merely proves that Cato spoke on the subject: but so he did on other laws; and Livy, who freely used his speeches, must have made mention of this, or at least of the law, by name. Least of all can it be placed in the year of Cato's praetorship, for he was governor of Sardinia[33] and had his hands full.

[I can only say that these moderate probabilities do not prove the negative of the moderately probable view of Lange.]

(2) He holds that the first law cannot have been passed earlier than 166 B C, nor the third later than 134 B C. For Livy's history (which must have given an account of this legislation) is in our hands down to 167, and does not tell us of their enactment: and the procedure of Scipio at Numantia was clearly a novel one. If it were not, why should Livy lay such stress on it as to make his abridger put the affair into his epitome? And, if novel, it must have been in consequence of some new legislation, recent or impending. It must have been recent, or we should hear of it in Livy's account of the campaigns of Aemilius Paullus. Besides, if the three laws were passed in a space of about thirty years, it is easier to understand their being generally regarded as one.

virgas. In Livy II 55 the man seems to have been liable to the flogging, but he got off through a popular outbreak.

[32] Zumpt I 2 pp 48—69.

[33] Livy XXXII 8 § 5, 27 § 3.

[Surely this is weaker than the last, and proves either too little or too much.]

(3) It is just worth mentioning that while he lays great stress on the word *omnium* in pro Rab § 12, and bases arguments thereon, he finds it convenient to overlook *item* in Sall Cat 51 § 22, and to force a distinction or even opposition between the *lex Porcia* and the *aliae leges* both there and in § 40.

(4) He considers it most probable that the valuable exemption granted by these laws was not extended to all citizens but only to the *cives optimo iure*, that is those who had the *ius honorum*. He argues that certain cases[34] of these degrading punishments are known to us, in which the sufferers were pretty certainly citizens, and in some of them we are distinctly told so. But they probably had not the *ius honorum*.

[This is possible, perhaps probable, though not exactly proved. The *cives* (*cum suffragio*) who had not the *ius honorum* would in any case not be very numerous. At least I can only discover one class answering to the description—those[35] who, having the Latin right plus the right of acquiring the Roman full franchise by settlement at Rome, had settled there, but, not having as yet been enrolled on the list of citizens, were temporarily regarded as *incolae* and allowed a sort of limited vote in the assembly of the tribes.]

(5) He urges that the laws have a tribunician air, and that three members of the Porcian house (whose names he gives) must have been tribunes in the short space of time mentioned above (2).

[This is the merest conjecture, as he is constrained to admit.]

(6) He thinks that a more likely conjecture as to the contents of the three laws is that the first exempted citizens in Rome from the degrading penalties whether they appealed to the people or not, the second dealt with citizens abroad, and the third was really *pro tergo civium* as forbidding scourging altogether.

[He admits that one might go on guessing some time at this rate. And surely these would not so readily bear the appearance of one law as those reconstructed by Lange.]

(7) He thinks that the *gravis poena* mentioned by Livy as contained in the *sanctio* of the Porcian law was nothing else than a clause declaring that a transgressor was liable to the penalties of *perduellio*, in fact that he was *perduellis*.

['*perduellis esto*' would be something like the form. It is indeed very

[34] See Sall Jug 69 § 4, Plutarch Marius 8, Gracchus apud Gellium x 3 § 3, Cic ad Att v 11 § 2 with Watson's note.

[35] See Livy xxv 3 § 16, Mommsen Rom Hist bk II cc 5, 7 [vol I pp 376, 462], Lange R A II pp 434—5, 452.

possible that, as a formal penalty of outlawry (*aqua et igni interdicere*) probably belongs to a late age of Republican legislation, the Porcian law may have employed this form, which soon, perhaps had already, assumed much the same effective meaning. But if it did, then Lange's earlier dates will suit it far better than Zumpt's own. And we must be careful not to employ against it Zumpt's favourite argument, that if it had been so Cicero must surely have made some allusion to it in his speech for Rabirius.]

I can only say in general that I wish I could do more towards removing the obscurity that surrounds this interesting subject. In the state of the evidence I can do no more than express a qualified approval[36] of the efforts of Lange. Zumpt seems to aim at more precision than is really attainable, and in the attempt to prove negatives he is misapplying an independent and honest judgment.

The references to *lex Porcia* in the speech for Rabirius (§§ 8, 12, 13) are of so general a nature that they cannot in my opinion be fairly applied to any one of the three laws, but must be taken as a loose reference to the Porcian legislation as a whole. Even were they not such, their authority would not serve to establish anything; for there is nothing that Cicero would not say to suit the needs of his case.

F. OF THE *LEX SEMPRONIA*.

To begin again with quotations, I select the following.

(1) Plutarch C Gracchus 4 *δύο νόμους εἰσέφερε, τὸν μέν... .....τὸν δέ, εἴ τις ἄρχων ἄκριτον ἐκκεκηρύχοι πολίτην, κατ' αὐτοῦ δίδοντα κρίσιν τῷ δήμῳ. τούτων τῶν νόμων ἄντικρυς ὁ μὲν.....τῷ δ' ἐνείχετο Ποπίλλιος· οὗτος*[1] *γὰρ στρατηγῶν τοὺς τοῦ Τιβερίου φίλους ἐξεκήρυξε. καὶ Ποπίλλιος μὲν οὐχ ὑποστὰς τὴν κρίσιν ἔφυγεν ἐξ Ἰταλίας.*

[36] Lange's theory is accepted by Mr Wordsworth in his 'Fragments and Specimens' p 624.

[1] See Cic Laelius § 37, Velleius II 7 § 2.

(2) Cicero de domo sua § 82 *ubi enim tuleras ut mihi aqua et igni interdiceretur? quod C Gracchus de P Popillio, Saturninus de Metello tulit, homines seditiosissimi de optimis ac fortissimis civibus; non ut esset interdictum, quod ferri non poterat, tulerunt, sed ut interdiceretur.*

(3) Cicero in Catil IV § 10 *video de istis qui se populares haberi volunt abesse non neminem, ne de capite videlicet civium Romanorum sententiam ferat.....at vero C Caesar intellegit legem Semproniam esse de civibus Romanis constitutam, qui autem rei publicae sit hostis, eum civem nullo modo esse posse: denique ipsum latorem Semproniae legis iniussu populi poenas rei publicae dependisse.*

(4) in Catil I § 28 (his country is appealing to Cicero) *quid tandem te impedit? mosne maiorum? at persaepe etiam privati in hac re publica perniciosos cives morte multarunt. an leges quae de civium Romanorum supplicio rogatae sunt? at numquam in hac urbe qui a re publica defecerunt civium iura tenuerunt.*

(5) Schol Ambros (on in Catil IV § 10) *sententiam*[2] *tulerat* [Gracchus] *ut ne quis in civem Romanum capitalem sententiam diceret.*

(6) Schol Gronov (ibid) *lege Sempronia iniussu populi non licebat quaeri*[3] *de capite civis Romani.*

(7) Livy XXVI 33 § 10 *per senatum agi de Campanis, qui cives Romani sunt, iniussu populi non video posse, idque et apud maiores nostros in Satricanis factum esse, cum defecissent, ut M Antistius tribunus plebis prius rogationem ferret sciretque plebs uti senatui de Satricanis sententiae dicendae ius esset*[4].

(8) Cicero de domo sua § 33 [*dico*] *hoc nobis esse a maioribus traditum; hoc esse denique proprium liberae civitatis, ut nihil de capite civis aut de bonis sine iudicio senatus aut populi*

[2] Of course *legem* is meant, and probably should be read, as Zumpt seems to think.

[3] This can only refer to a *quaestio extraordinaria*, as Zumpt remarks.

[4] This passage is quoted by Madvig to shew that the principle was an old one. For the later custom see Cic Brutus § 85.

aut eorum qui de quaque re constituti iudices sint detrahi possit[5].

This *lex Sempronia* seems to belong to the first tribunate of C Gracchus, 123 BC. His object in bringing forward such a proposal was twofold. First, he had to revenge the death[6] of his brother and the banishment[7] of a number of his adherents. The person principally aimed at was P Popillius Laenas, who had been president of the *quaestio extraordinaria* by which the followers of Ti Gracchus had been tried. In the second place he had to win the favour of the people by popular measures; and this law, prohibiting these trials by special commissions except with the consent of the people, was aimed directly at the assumption of such powers by the senate.

That the appointment of such special commissions by the senate without the sanction of a popular vote was strictly speaking an unconstitutional step, cannot be doubted. But in this matter as in others by the gradual disuse[8] of what was a necessary condition of validity the senate had come to consider itself entitled to act alone: if any demagogue attacked them on this ground it was generally[9] possible to employ in their defence the intercession of one tribune against another. After the overthrow of the elder Gracchus the nobles proceeded in this unconstitutional manner against the remaining leaders of the popular party: and again in the case of the Catilinarian conspirators the senate formed itself into a sort of High Commission to try them. Even Cicero could only defend this conduct on the ground that men who had been declared public enemies could not claim the right to be treated as citizens.

[5] I have added this as shewing how audaciously an orator could class together three sorts of jurisdiction, (1) senatorial (2) popular (3) that of special commissions, as though all on the same footing, when it suited his purpose.

[6] See pro Rab § 14.

[7] See Plut Ti Gracchus 20.

[8] See the quotation (9) from Asconius given in appendix A. These special commissions originally became common owing to the clumsiness of trials before the *comitia*, and they were not wholly superseded by the *quaestiones perpetuae*. Lange II 514, 648. See Brutus § 85.

[9] See Zumpt Crim I 2 pp 211—6.

Cicero tells us (pro Rab § 12) that C Gracchus carried a law *ne de capite civium Romanorum iniussu vestro* [sc *populi*] *iudicaretur*[10]. This is the most explicit statement on the subject that has come down to us from any Latin author: and it must therefore serve as our chief text in the following enquiry concerning the contents of the law.

(1) It seems to have reenacted (*a*) the provisions of the Valerian laws[11] on *provocatio*, as may be gathered from Cicero's appeal to the Sempronian together with the Porcian laws as having been violated by Verres in the case of Gavius, and (*b*) provisions resembling those of the Porcian[12] laws, by a general prohibition of the penalty of death, as is to be gathered from the passages[13] of Cicero and Sallust relating to the Catilinarian affair.

(2) It expressly forbade the trial and sentencing of citizens so as to affect their *caput*, the rights and privileges of a free Roman citizen, by a *quaestio extraordinaria* without the consent of the people.

(3) The difficulty now meets us in the attempt to discover what there was new in all this. Surely there must have been some new provision in the law. Yet it does seem, as Zumpt asserts, that all these enactments were, so far as relates to the liability of offending magistrates, already in existence; and it can hardly be supposed that in such a period as that of the Gracchi they were in serious danger of being forgotten. Zumpt then argues that the novelty must have consisted in the extension of the liability to those who took part in this violation of citizen right, such as the board of advisers (*consilium*)[14] by whom the offending magistrate

[10] The word is opposed to *indicta causa* just below.

[11] It seems from Plut Ti Gracchus 16 that the elder Gracchus just before his fall had proposed a law granting appeal to the people from the sentence of a *quaestio perpetua*—an absurdity, as will be seen from Maine's Ancient Law c 10. See in general Mommsen bk IV c 3 (vol III pp 117—8, 124).

[12] II in Verrem v § 163, Gellius x 3 § 13.

[13] See appendix E.

[14] See Cic Laelius § 37 and Reid's note.

had been supported and the senators who had assisted in the passing of a *sctum* for the appointment of any such extraordinary judicial commission. He urges that the measures employed against the adherents of Ti Gracchus would not have been undertaken by the boldest of consuls on their own sole responsibility: they must have acted on instructions from the senate. I must admit the plausibility of this view. He goes on to shew that the timidity of certain senators shewn in absenting themselves from the debate on the Catilinarians may be best accounted for on this supposition. The senate was acting illegally[15] as a court of justice on that occasion. The argument of Cicero, that the men were *hostes* not *cives*, was a mere evasion; for their true character had only been prejudged by the *sctum ultimum*, the constitutional validity of which had been recently called in question in the case of Rabirius, which was a moral defeat for the senate. We can well understand an unwillingness on the part of cautious members to render themselves by participation in such proceedings liable to the penalties of the Sempronian law. Allowing this explanation to be plausible, I must add that the attempt of Cicero to construe the presence of Caesar into an admission[16] that the law did not apply in the case was no more than the artful hit of a clever debater. All that Caesar wanted[17] was to save the prisoners from the blind fury of the moment. His own risk under the Sempronian law would be practically nothing; and it was no time to be pointing out the risk run by others when there was nothing to be gained by it in debate.

(4) Whether the law was in any degree retrospective in its effect, seems very doubtful. Plutarch clearly understood it to have been so, but his cursory notice cannot be held to prove that the law under which the *quaestio extraordinaria* to try Popillius was appointed was the same law as the above. But that either a separate law or a special clause of this one

[15] See Zumpt Crim 1 2 pp 210—1.

[16] Notice the word *intellegit*.

[17] Caesar's speech is given by Sallust, and its authority as a report is strengthened by Plut Cato minor 23.

did bring such past acts under the operation of this law, is pretty certain. Else why was the accusation of Popillius delayed till this law had been passed?

(5) We must also doubt whether the provision against the ensnaring of unwary citizens through the omission of the due forms of procedure[18] (*ne quis iudicio circumveniretur*) belonged to this or to a separate law.

(6) The penalty named[19] in the *sanctio* was the liability to trial in a *iudicium populi*. Probably it took the form of declaring[20] the offender to be *perduellis*. The court before which he would be impeached was the sovereign people assembled in their centuries. This was the supreme court alone competent[21] to judge where a citizen's *caput* was concerned, and indeed remained so till the end of the Republic. The penalty on conviction would then be *aquae et ignis interdictio*.

To apply these conclusions to the speech for Rabirius, it seems abundantly clear that the power claimed by the senate of issuing the *sctum ultimum* in emergencies, on the maintenance of which Cicero lays so much stress, was at least indirectly taken away by this law of Gracchus. And it is to be remarked that when dealing with this topic[22] Cicero avoids all reference or allusion to this or any other law. We should also infer that the nomination of the duumvirs by the praetor was illegal, at all events since the passing of this law. Accordingly in § 12 we find the conduct of Labienus opposed to the legislation of Gracchus with as much strength as the orator thought suited to the ears of a hostile audience.

[18] So expressed by Lange R A III 31 from Plut C Gracchus 3. But Ramsay on pro Cluent §§ 151—4 seems to think that it referred to judicial corruption.

[19] See the quotation from the speech *de domo*.

[20] See appendix E (§ 7 of my exposition of Zumpt's view).

[21] See Cic de legibus III §§ 11, 44, 45, pro Sest § 65, Zumpt Crim I 2 pp 231—3.

[22] From § 13 it seems that Labienus had in some way appealed to this and the Porcian law—perhaps as supporting his view on this point against that of Cicero.

[See Lange RA I p 385, II pp 413, 523, 525, 612, 647, III p 31, Zumpt's Criminalrecht I 2 pp 69—76, Madvig's Verfassung und Verwaltung I pp 299, 300; to all which I am indebted.]

G. OF THE *TRIBUNI AERARII.*

In the year 70 BC the praetor L Aurelius Cotta carried[1] a law for the reform of the criminal courts. By this he deprived the senators of that exclusive right of sitting on juries which had been restored to them by Sulla. But he did not simply divide this power equally between the senators and *equites*: he ordained that each jury should consist of three panels (*decuriae*)[2], one of senators one of *equites* one of *tribuni aerarii.* Of these last we can only be said to know the following facts.

(1) They were recognized as a clearly marked class (*ordo*) of citizens. The way in which they are spoken of[3] proves this.

(2) They were a numerous class, or they would not have been able to supply a sufficient number of competent jurors.

(3) They were closely connected with the *equites*; for not only are they generally mentioned as acting in full sympathy with them, but in passages[4] where nothing turns on the distinct mention of the third *decuria* we find the term *equites* used to include both.

(4) They were (as we should expect) not confined to Rome, but were some of them resident[5] in *municipia.*

(5) Their judicial function was taken from them[6] by Julius Caesar.

[1] Madvig II pp 222—3, Lange III 197.

[2] See ad Quint frat II 4 § 6.

[3] See in Catil IV § 15, ad Att I 16 § 3, pro Plancio § 21. When Dion Cassius calls them ἐκ τοῦ ὁμίλου τινές he is speaking of their ejection from the courts by Julius Caesar, and his authority is of little or no weight on the point.

[4] See pro Cluent §§ 121, 130, pro Font § 36 (26).

[5] See pro Plancio § 21.

[6] Suet Jul 41 *iudicia ad duo genera*

The following points also deserve attention, though the evidence does not warrant the drawing of certain conclusions.

(6) It is probable that their *ordo* was—at all events after the passing of the *lex Aurelia*—based[7] like that of *equites* on a definite *census* footing. For not only would this be very natural in itself and in accordance with Roman precedent, but we know that when Augustus added a fourth *decuria*[8] he took its members from a class defined by *census*. It is thus almost certain that the same principle was acted upon throughout.

(7) It is probable that their name was inherited from the *tribuni aerarii* of whom we have mention[9] as existing in ancient times. These seem to have been persons entrusted with the duty of receiving the *tributum* (which was raised *tributim*) and paying the money to the soldiers as *stipendium*. In the later days of the Republic the raising of *tributum* ceased and the *stipendium* was paid through the quaestors. It is therefore not to be wondered at that we find no mention of *tribuni aerarii* again until the time of Cicero. They may have been in some sense a survival of the agents employed in ancient times. But how they came to outlive the loss of their functions, how they became an *ordo* at all, whether they were in any way connected with the *curatores tribuum* mentioned by Varro,—these questions, though interesting in themselves, admit of no definite answer in the present state of the evidence; indeed they are mere matters of baseless speculation.

(8) The opinion of Mommsen, that they were men of equestrian *census* who had served the office of *tribunus aerarius*, is open to several objections. Passing over the point that this

iudicum redigit, equestris ordinis ac senatorii; tribunos aerarios, quod erat tertium, sustulit. See Cic philippic I § 20, Dion Cassius XLIII 25.

[7] Certainly for judicial purposes after the *lex Pompeia iudiciaria* of 55 B C, for which see philippic I § 20 and the 'index legum' in Orelli and Baiter's onomasticon.

[8] Suet Aug 32 *ad tris iudicum decurias quartam addidit ex inferiore censu, quae ducenariorum vocaretur iudicaretque de levioribus summis.*

[9] Varro de ling Lat V § 181, Paul diac (Müller's Festus p 2), Cato apud Gell VI (VII) 10, Gaius IV 27. See also Livy I 43 § 13.

duty (in the early times when we hear of it) had probably nothing official[10] about it, it is to be noted that the passages upon which this view rests are chiefly such as are referred to above on (3), which give no such inference when fairly regarded, or such as Tac ann XI 22, which only speaks in general terms[11] of the recovery by the *equites* of a share in the *iudicia*. It may also be asked how it comes that, if there was an office of this name important enough to be held by *equites*, we still have no reference to any function as falling within its competence.

(9) As to the date at which the *tribuni aerarii* became recognized as an *ordo*[12], we have no materials that enable us to determine it even approximately. The reference in pro Rabirio § 27 has been explained by Madvig to mean that men who in 63 BC were *equites* and *tribuni aerarii* had as young men in 100 BC taken part in the suppression of Saturninus. But this interpretation, which seems to me a very forced one, has been rejected by Mommsen and Becker. I venture to think that the members of those *ordines* at the time are meant, even as the *senatus* and *nobilitas* of §§ 20, 21 are the senators etc of that time. If this be so, it will follow that (*a*) the *tribuni aerarii* were already an *ordo* in 100 BC, and consequently (*b*) were not first recognized as such by the *lex Aurelia* of 70 BC.

[For more detailed discussion see Becker and Marquardt's Handbuch der Römischen Alterthümer part III div 2 pp 130—134, Lange's Römische Alterthümer I pp 498, 509, 540, 549—50, III pp 197—8, Madvig's Verfassung und Verwaltung des Römischen Staates I pp 182—5, Mommsen's die Römischen Tribus §§ 7, 8, to the first and third of which works I am especially indebted.]

[10] Madvig I p 184.

[11] So Plut Pomp 22. The statement of Velleius II 32 § 3, that Cotta divided the judicial power between the senate and *equites* equally (*aequaliter inter utrumque ordinem*) is so inexact as to deceive nobody.

[12] How loosely the word *ordo* was used may be seen from the note on § 27 of the speech.

H. OF *IGNOMINIA* AND *INFAMIA*.

Both these words are used in the general sense of 'disgrace' 'dishonour'. But they have also a special and technical sense which requires notice, and may be best brought out by considering the relations between the two. These seem to be as follows.

(*a*) *infamia* is the condition of the *infamis*. Such a condition necessarily results from certain antecedents, such as[1] condemnation in a *turpe iudicium*, following some dishonourable trade or profession, etc. It is not declared or announced in the form of a sentence of any kind. It is the immediate and unavoidable consequence of certain courses of action which offend against the popular sentiment or the positive law, and it is at once recognized by all as *ipso facto* existent. The *infamis* does not strictly speaking undergo a *capitis deminutio* but only[2] *minutio existimationis*, though the practical consequences do not greatly differ. He remains a citizen, but loses the *ius honorum* and probably *ius suffragi* also, and the right to display the *imagines* of his ancestors[3] and wear the *latus clavus*. The censors were bound to take notice of his condition and strike him out of a tribe (*tribu movere*) and make him *aerarius* (*aerarium facere* or *relinquere*), whereby his position became that of a *civis sine suffragio*. It is always to be remembered that when a censor struck the name of an *infamis* out of the tribe list he did not thereby make him *infamis*; because the man was *infamis*, therefore he was struck out.

(*b*) *ignominia* is the consequence[4] of the *notio animadversio notatio* of the censor. It depended upon the censor's will, and the *nota* was often affixed to a man's name from

[1] pro Cluent § 119, edictum Iulianum 1 7, Digest III 2, Lange I 506—7, 805, Becker Röm Alt II 1 pp 121—4, Madvig II pp 259, 297.

[2] pro Rosc com § 16, pro Caecina § 6, Digest L 13 § 5, Lange I 208—9, 506—7, Becker as before.

[3] pro Sulla § 88, pro Cluent § 120.

[4] Lange I 806.

caprice prejudice and party or personal hatred. It was not an enduring[5] condition, but had to be renewed each time by the new censors. But the man so degraded on one occasion might be reinstated by the next censors in his full privileges; or the two censors might disagree, and what one had done his colleague would readily undo. There were various degrees[6] of this degradation. Probably the *ius honorum* was in any case lost. But in other respects it seems that the censors inflicted more or less disgrace (as *senatu movere, equum vendere iubere, tribu movere, aerarium facere*) according to their conception of deserts and the rank of the offender. They need not act in recognition of existing *infamia*, or of a judicial decision of any kind; public rumour was enough. The *ignominia* was not strictly speaking[7] a penalty, nor the censor's decision a *iudicium*. It should be added that the *aerarius* lost *ius suffragi* altogether; while the man *tribu motus* in the milder sense[8] (transferred from a rural to a city tribe) got a worse vote. The *aerarius* remained liable[9] to army service, though not in the legion, and also was exposed to arbitrary taxation.

It seems then that the man *infamis* gives the name to his condition of *infamia*, while on the other hand the imposed condition of *ignominia* makes a man *ignominiosus*.

I. OF THE *VEXILLUM RUSSI COLORIS*.

We are told by Dion Cassius XXXVII 28 that it was a very ancient custom of the Romans to keep a military standard[1] flying on the Janiculum during the meetings of the *comitia*

[5] See Livy IV 24, 31 for case of Mamercus Aemilius.

[6] See generally Livy XXIX 37, XLV 15, IV 24 §§ 7, 8, 31 § 5, Cic pro Cluent §§ 119—122, Lange I 507, 805—7, Becker p 123.

[7] See the long discussion of this matter in pro Cluentio §§ 117—131, and compare de republ IV § 6.

[8] Livy XLV 15 §§ 4, 5, Pliny nat hist XVIII § 13, Lange I 805—6.

[9] Lange I 507.

[1] Plut Fab 15 tells us that the signal for battle was χιτὼν κόκκινος ὑπὲρ τῆς στρατηγικῆς σκηνῆς διατεινόμενος.

centuriata. This was to indicate that watch and ward was being duly kept at that post by a guard set there for that purpose. For inasmuch as the centuries met outside the city wall, and represented the armed force[2] of the Roman people, it was dangerous to leave the city in their rear exposed to the attack of an enemy, whose first step would be to occupy the Janiculum. No further business could be transacted[3] at the meeting when the hauling down of the ensign announced the withdrawal of the guard. He adds that the custom was still kept up in his time from religious motives.

Macrobius sat I 16 § 15 speaks of *triginta dies*[4] *quibus exercitui imperato vexillum russi coloris in arce positum est.* Livy XXXIX 15 § 11 says *cum vexillo in arce posito comitiorum causa exercitus eductus esset.*

There is here an apparent disagreement as to the spot where the guard and flag were planted, for at Rome *arx* usually denoted the citadel on the Capitoline: and from the place of assembly in the Campus Martius both the Capitoline and the Janiculum would be visible. But there can I think be little doubt that Weissenborn is right[5] in taking *arx* to stand for the Janiculum in this connexion. That this was traditionally a menaced point of strategic importance is clear from the story of Cocles in Livy II 10 §§ 3, 4. And the word *arx* is used of it (though quite untechnically) in I 33 § 6. Lange however (Röm Alt I 555) seems to incline to the view that the *arx* in question was that commonly so called on the Capitoline.

[2] Hence called *exercitus.*

[3] For the breaking up of assemblies see Cic de domo § 45.

[4] Compare Paul diac p 103 *iusti dies dicebantur triginta, quum exercitus esset imperatus et vexillum in arce positum.* Lange I 554.

[5] Madvig I p 255 takes the same view.

K. OF THE CONNEXION BETWEEN *MULTAE IRROGATIO* AND EXILE AND *INFAMIA*.

It seems that in early times the fines imposed by magistrates (*multae dictio*) or named in laws were not allowed to exceed the half[1] of the offender's property. But it is certain that in the fine-processes before the *comitia tributa* this limitation was not[2] observed. This may be explained by observing that each *multae irrogatio* was a separate legislative act[3] and that the sovereign people could only be bound by the expression of its own will.

The simple *multae dictio* brought[4] no *infamia*. The *multa* according to Huschke[5] is essentially a composition for some wrong done. But the *multae irrogatio* is an attempt to get a fine inflicted by the people[6], and so to force the accused to compound for an offence which might have been dealt with as *perduellio*. There is therefore strong *a priori* likelihood that condemnation in such a fine-process would make a man *infamis*. That a vote of the people in their centuries should deprive a man of all that made life worth having, or even of life itself, while a vote of the same given by tribes could inflict a fine but involved no further consequences, is a position of affairs hardly conceivable. Yet it seems to have been so[7] (at least in theory) in the case[8] of Menenius. But we are told that he would not endure the disgrace put upon him, and died of a broken heart. So too Livius Salinator[9] would not bear

[1] Cato apud Gellium VI (VII) 3 § 37, Festus p 246, see Madvig II p 295, Lange II 543, 541, Mommsen I p 156.

[2] See Dionys XIII 5 of Camillus.

[3] Probably confirming a preceding *multae dictio*, and following the pattern of the older capital jurisdiction of the centuries. See Introd C (*n*), appendix B, and Maine's Ancient Law c 10.

[4] Huschke p 245.

[5] Huschke pp 172—4. Compare pro Cluent § 29 *qui et naturae et legibus satisfecit: quem leges exilio natura morte multavit.*

[6] See Huschke pp 175—6, 245.

[7] See Zumpt I 2 pp 292—4.

[8] Liv II 52 § 5, Dionys IX 27. See case of two consuls in Liv III 31 §§ 5, 6.

[9] Suet Tib 3, Liv XXVII 34 §§ 4, 5, Valer Max II 9 § 6. He was fetched back to Rome and afterwards elected consul and censor, Liv XXVII 34 §§ 6—15, XXIX 37.

the disgrace of a similar condemnation, which he lived to avenge. So L Iunius[10] the colleague of P Claudius Pulcher died by his own hand to avoid the disgrace of a condemnation. In all these cases the word used by the Latin writers is *ignominia* in its general sense. There is no *infamia*, nothing with which legal consequences are bound up. But it seems clear that when a fine-process was regarded as of an essentially criminal nature the matter would probably be taken up by the next censors[11] and a real technical *ignominia* imposed on the offender. Gradually popular sentiment[12] came to regard these criminal fine-processes as necessarily bringing disgrace on the condemned. At last we find a step taken towards the direct recognition of this. In 104 BC was passed the *lex Cassia* of the tribune L Cassius Longinus of which Asconius[13] says *quae populi iudicia firmavit.* He adds that Cassius carried a number of laws to weaken the power of the nobles, *in quibus hanc etiam ut, quem populus damnasset cuive imperium abrogasset*[14], *in senatu non esset.* The law was aimed chiefly at Q Servilius [Caepio] consul two years before, who had been deprived of his command by the people because of his defeat by the Cimbri. It manifestly imposed a certain degree of *infamia.* We shall now I think be justified in declaring it probable that in the later times of the Republic men fined by sentence of the tribes—at least for heinous offences—lost somewhat of their repute and standing as citizens and became so far *infames.*

[10] Cic de nat deor II § 7, Valer Max I 4 § 4.

[11] Thus in Livy XXIX 37 § 9 *M Livium, quia populi iudicio esset damnatus, equum vendere iussit.* See Huschke p 244.

[12] How great reliance was placed on this in early times may be seen from *improbe factum* in Livy X 9 (quoted at head of appendix E).

[13] Ascon in Cornel (Orelli p 78), Huschke p 245. So in the *lex Iulia municipalis* (included in Wordsworth) ll 108 foll we find mentioned, as causes of exclusion from the local senate, cases, 'almost exactly those which were visited legally with *infamia*', and among them *queive iudicio publico Romae condemnatus est erit, quocirca eum in Italia esse non liceat* etc. See Mommsen I p 464.

[14] That this was done by the tribe-assembly is well known. See Lange II 659—60. A good instance in the present connexion is found in Cic de domo §§ 83, 84.

It will be observed that in the cases of Menenius and Livius cited above we are told that the victim withdrew indignantly into voluntary exile. The same is reported[15] of Camillus. And it is surely probable that, as the tribe assembly came to be more and more employed as a court of criminal jurisdiction, means would be found to drive the condemned into exile. This was most likely at first accomplished by imposing a fine of great amount, in the hope that the offender would be unable[16] either to pay or find sureties (*praedes*) for payment of the same, and so become liable to arrest and imprisonment. To avoid this he would probably fly from Roman territory. The practice once begun would then by these or other means be kept up and become regular through use.

Further, I would in dealing with this question generally follow the line of argument taken by a great modern authority[17] in speaking of the competence of the jury courts and their relation to the tribe assembly.

> Now the decline of the Republic was exactly the period during which the Quaestiones Perpetuae were established, so that the statutes creating them were all passed by a legislative assembly which itself could not, at its ordinary sittings, punish a criminal with death. It followed that the Permanent Judicial Commissions, holding a delegated authority, were circumscribed in their attributes and capacities by the limits of the powers residing with the body which deputed them. They could do nothing which the Assembly of the Tribes could not have done; and, as the Assembly could not sentence to death, the Quaestiones were equally incompetent to award capital punishment.

Though the notion of delegated authority is here perhaps too definitely and strictly conceived[18] to be quite accurate, it

[15] Liv v 32 §§ 8, 9, Dionys XIII 5. Livy makes the fine inflicted on him absent.

[16] See Gellius VI (VII) 19 § 5, Dionys XIII 5, Huschke pp 245, 526. Lange II 543 refers to Livy XXV 2 § 9. The contrary arguments of Zumpt I 2 pp 293—6 go far enough to shew that the practice must have grown up gradually.

[17] Maine's Ancient Law c 10. What the words 'at its ordinary sittings' mean, I cannot tell.

[18] See Zumpt II 1 p 353.

is sufficiently so for my purpose. If the power of the juries could not be more than that of the tribe assembly, then conversely the power of the latter could not be less than that of the former. Now we know[19] that *infamia* and exile followed upon conviction in certain cases before the jury courts. If so, how great is the probability that similar consequences[20] attended upon condemnation by the tribe assembly itself.

Moreover, if we reflect that a fine was at first contemplated in the case of Cn Fulvius, which must even from the beginning have been regarded as very serious, and that a fine was eventually imposed upon P Claudius Pulcher, we shall have the utmost difficulty in believing that no *infamia* attached to these culprits.

I can say no more on this subject. The deficiency of direct evidence is not peculiar to this question. Many of the most important points in the constitutional history of Rome present the same difficulty. Nor is this to be wondered at: for the writers who might have made such questions clear generally content themselves with passing reference or allusion to matters that everyone would know, and of course they could not tell to what details the interest of posterity would turn.

[19] Huschke p 516 refers to Cic pro Rosc com § 16 (of civil cases), pro Cluent §§ 119, 120, de orat I §§ 182—3, II in Verr II § 98, which shew that these are *causae capitales*. See appendix C, and compare Digest XXXVII 14 10 *Labeo existimabat capitis accusationem eam esse cuius poena mors aut exilium esset.*

[20] It is to be remembered that from very early times the tribes decreed outlawry against political criminals in their absence. See Introd C (*i*).

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